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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE COURT

OF THE

VICE CHANCELLOR OF ENGLAND,

DURING THE TIME OF

THE R^T HON^{BLE} SIR JOHN LEACH, KN^T.

By HENRY MADDOCK, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. IV.

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TABLE

OF THE

CASES REPORTED.

A.	Page	B.	Page
ALLEN v. Kilbre - - -	464	Bage <i>ex parte</i> - - -	459
Allen <i>ats.</i> King - - -	247	Baker <i>ats.</i> Johnstone (<i>in note</i>)	474
Annesley and others v. Sir		Banner <i>ats.</i> Massey - - -	413
John Simeon and others -	390	Bannister <i>ats.</i> Haley - - -	275
Anonymous - - -	379	Bass <i>ex parte</i> - - -	270
_____ - - -	228	Bassett <i>ats.</i> Sackett - - -	58
_____ - - -	252	Bayley v. Mansell - - -	226
_____ - - -	255	Beal <i>ats.</i> Wilkinson - - -	408
_____ - - -	271	Beech, <i>in re</i> - - -	128
_____ - - -	273	Beeston v. Booth - - -	161
_____ - - -	395	Bell v. Tinney - - -	372
_____ - - -	461	Bellott <i>ex parte, in re</i> Lingard	379
_____ - - -	462	Bench v. Biles - - -	187
_____ - - -	463	Bentham v. Wiltshire - - -	44
Armitage <i>ats.</i> Harrison - -	143	Bennett <i>ats.</i> Hitchon - - -	180
Attorney General v. Burch -	178	Bennett <i>ats.</i> Spurrier - - -	39
Attorney General v. Fea -	274	Bernales <i>ats.</i> De la Torre -	396
Attorney General v. Harley	263	Biles <i>ats.</i> Bench - - -	187

A TABLE OF THE CASES REPORTED.

V

	Page
Glegg v. Legh - - - -	193
Glover <i>ats.</i> Birch - - - -	376
Godfrey <i>ats.</i> Lord - - - -	455
Graves v. Hughes - - - -	381
Grant <i>ats.</i> Thompson - - - -	438
Greene v. Greene - - - -	148
Grey v. Dickenson - - - -	464
Groomsbridge <i>ats.</i> Browne -	495
Gwydir (Lord) and another, <i>ex parte</i> - - - - -	281

H.

Haley v. Bannister - - - -	275
Hardman <i>ats.</i> Rock - - - -	253
Hargreaves <i>ats.</i> Tillotson -	172
Harley <i>ats.</i> Attorney-General	263
Harper v. Faulder - - - -	129
Harrison v. Armitage - - - -	143
Harrison <i>ats.</i> ——— - - - -	252
Heeman v. Midland - - - -	391
Herries <i>ats.</i> Jenkins - - - -	67
Hibberson v. Cooke - - - -	248
Hitchon v. Bennett - - - -	180
Hoare <i>ats.</i> Dutchess of Buc- cleuch and Queensbury -	467
Hobson <i>ats.</i> Wild - - - -	49
Holkirk v. Holkirk - - - -	50
Holland <i>ex parte</i> - - - -	482
Honywood (Sir J. C.) <i>ats.</i> Jeffery - - - - -	390
Howell <i>ats.</i> Gibbons - - - -	52
Hughes <i>ats.</i> Graves - - - -	381

I.

Innan v. Parsons - - - -	271
--------------------------	-----

Page

J.

Jeffery and others v. Sir J. C. Honywood - - - - -	398
Jenkins v. Herries - - - -	67
Johnson <i>ats.</i> Mackenzie -	373
Johnstone v. Baker (<i>in note</i>)	474

K.

Keane and others v. Robarts and others - - - - -	332
Keighley <i>ats.</i> East India Company - - - - -	16
Kilbre <i>ats.</i> Allen - - - -	464
Kilconcey (Lord) v. Ley - -	212
King v. Allen - - - -	247
King <i>ats.</i> Ellis - - - -	126
Kingscote <i>ats.</i> Estcourt - -	140
Knight v. Knight - - - -	1

L.

Lacy <i>ats.</i> Sowersby - - - -	142
Lane <i>ex parte</i> - - - -	479
Lann v. Church - - - -	391
Law <i>ex parte</i> - - - -	273
Legh <i>ats.</i> Glegg - - - -	193
Leigh <i>ex parte</i> - - - -	394
Ley <i>ats.</i> Kilcourcey - - - -	212
Lisle <i>ats.</i> White - - - -	214
Lord v. Godfrey and others	455
Lowndes v. Robertson - -	465

M.

Mackenzie v. Johnson and others - - - - -	373
--	-----

	Page		Page
Malden (Mayor, &c. of) v.		Rippon <i>ats.</i> Curtis	462
Coates - - - - -	447	Robarts <i>ats.</i> Keane	332
Malins <i>ats.</i> Wheeler - - -	171	Robertson <i>ats.</i> Lowndes	465
Mansell <i>ats.</i> Bayley - - -	226	Rock v. Hardman	253
Marlborough (Duke of) <i>ats.</i>		Roffey v. Shallcross	227
Shakel - - - - -	463	Rowe <i>ats.</i> Gardiner	236
Massey and others v. Banner	413		
Melling v. Melling - - -	261		
Meyrick v. Wishaw - - -	272		
		S.	
Miall v. Brain - - - - -	119	Sackett v. Bassett	58
Milner <i>ats.</i> Slade - - - -	144	Sayers <i>ats.</i> Wills	409
Midland <i>ats.</i> Heeman - - -	391	Scott <i>ats.</i> Champernowne	209
Moore <i>ats.</i> Ward - - - - -	368	Shalcross <i>ats.</i> Roffey	227
Morgan v. Shaw - - - - -	54	Shaw <i>ats.</i> Morgan	54
Myers <i>ats.</i> Duke of Norfolk	83	Shakel v. Duke of Marl-	
Myers v. — - - - -	268	borough - - - - -	463
Myles <i>ats.</i> French - - - -	404	Shephard v. Elliott	254
		Simeon (Sir John) <i>ats.</i> An-	
N.		nesley - - - - -	390
Norfolk (Duke of) <i>ats.</i> Forth	503	Simés v. Smith	366
Norfolk (Duke of) v. Myers	83	Sitwell v. Sitwell	183
Norbury v. Norbury - - -	191	Slade v. Milner	144
North <i>ex parte, in re</i> Cole-		Smith v. Claxton	484
man - - - - -	395	Smith <i>ats.</i> Dickinson	177
Novaes and another v. Dor-		Smith v. Thompson	179
rien - - - - -	362	Smith <i>ats.</i> Wathen	325
		Sowarsby v. Lacey	142
P.		Spear <i>ats.</i> Rhode	51
Parsons <i>ats.</i> Inman - - - -	271	Spurrier v. Bennett	39
Pearson <i>ats.</i> Coates - - - -	262	Steadman v. Ellis	240
Pearson <i>ats.</i> Sturgess - - -	411	Stevens <i>ex parte</i>	256
		Sturgess v. Pearson	411
Q.		Sutton <i>ex parte, in re</i> Brereton	395
Qualey v. Qualey - - - -	213		
		T.	
R.		Tanner v. Dean	176
Rhode v. Spear - - - - -	51		

A TABLE OF THE CASES REPORTED.

vii

	Page		Page
Thellusson and others v.		Wheeler v. Malins - - -	171
Woodford and others - -	420	White v. Lisle - - -	214
Thompson v. Grant - - -	438	Whitehead <i>ats.</i> Gibson - -	241
Thompson <i>ats.</i> Smith - - -	179	Wickham v. Evered - - -	53
Thornhill v. Thornhill and		Wild v. Hobson - - -	49
others - - - - -	377	Wilkinson v. Beal and others	408
Thorpe v. Freer - - - -	466	Williams <i>ats.</i> Wood - - -	186
Tinney <i>ats.</i> Bell - - - -	372	Wills v. Sayers - - -	409
Tillotson v. Hargreaves -	172	Wilson <i>ats.</i> Cooke - - -	380
Tolson v. Lord Fitzwilliam	403	Wiltshire <i>ats.</i> Bentham - -	44
Torre (De Le) v. Bernales -	396	Wishaw <i>ats.</i> Meyrick - -	272
Trotter <i>ats.</i> Crawford - -	361	Wolcott <i>ats.</i> Cripps - - -	11
		Wood v. Williams - - -	186
W.		Woodford <i>ats.</i> Thellusson -	420
Ward and another v. Moore		Wright <i>ats.</i> Freme - - -	364
and another - - - -	368	Wyatt <i>ats.</i> Dixon - - -	392
Warwick <i>ex parte</i> - - - -	262		
Wathen v. Smith - - - -	325	Y.	
Watson <i>ex parte</i> - - - -	477	Yates v. Farebrother - - -	239
Weildon <i>ats.</i> Farlow - - -	460	Young <i>ats.</i> Carrick - - -	437



CASES

BEFORE THE

VICE-CHANCELLOR.

Between ROBERT KNIGHT, Esq. GEORGIANA KNIGHT an Infant, by the said ROBERT KNIGHT her Father and next Friend; HENRY RALEGH KNIGHT, Esq. CHARLES RALEGH KNIGHT an Infant (a); CHARLES FULLER, Esq. and JANE his Wife; FRANCES ELIZABETH KNIGHT, Spinster, JULIA KNIGHT an Infant, and CAROLINE EMILY KNIGHT an Infant, by HENRY RALEGH KNIGHT their Father and next Friend - - - - - Plaintiffs;

And

HENRY CHARLES KNIGHT an Infant, Defendant,

1819.

15th January.

THE Bill stated, That the Right honourable Robert late Earl of Catherlough, Viscount Barrels and Baron Luxborough, of Shannon, in the Kingdom of Ireland,

On Demurrer held, that a Supplemental Bill, to perpetuate the Testimony of Witnesses, on the ground of Facts discovered since

(a) No next Friend to the Infant was named in the Brief, Copy, it appeared, a next Friend was named. but on reference to the Office

the filing of the Original Bill, but not stating what these Facts were, could not be sustained.

1819.

KNIGHT
and others
v.
KNIGHT.

deceased, being seised in fee of several Manors and Hereditaments, made his Will, 11th day of *February* 1772, and thereby, subject and charged as in the Will mentioned, the Testator gave and devised to Sir *Harry Burrard*, *William Snell*, Esq. and *William Jacomb*, Esq. and their Heirs, all his Manors, Messuages, Farms, Lands, Tenements and Hereditaments, in the Counties of *Warwick*, *Lincoln*, *Middlesex*, *Montgomery*, *Salop*, *Flint*, *Chester*, and *Worcester*, with their Appurtenances; to hold the same unto the said Sir *Harry Burrard*, *William Snell*, and *William Jacomb*, and their Heirs, to the use of said *Robert Knight*, therein called his Son or reputed Son, begotten on the Body of *Jane Davies*, for his Life, without Impeachment of Waste; with remainder to the use of the said Sir *Harry Burrard*, *William Snell*, and *William Jacomb*, and their Heirs, during the Life of said *Robert Knight*, in Trust, to support the contingent Uses and Estates thereafter devised; with remainder to the use of the first and every other Son of the Body of said *Robert Knight*, in Tail Male; with remainder to the use of the Plaintiff *Henry Raleigh Knight*, therein called the Testator's Son or reputed Son, begotten on the Body of said *Jane Davies*, for his Life, without Impeachment of Waste; with remainder to the use of last-named Trustees and their Heirs during the life of the Plaintiff *Henry Raleigh Knight*, in Trust, to support the contingent Uses and Estates thereafter devised; with remainder to the use of the first and every other Son of the Body of the said *Henry Raleigh Knight*, in Tail Male; with remainder to the use of all and every the Son and Sons of the Body of the said Testator on the Body of said *Jane Davies*, begotten or to be begotten, provided the same should be born in his said Testator's life-time, or within nine months

next after his decease, in Tail Mail; with remainder to Plaintiff *Jane Fuller*, in said Will called *Jane Davies*, otherwise *Knight*, (and therein called the Daughter or reputed Daughter of the Body of said Testator, on the Body of said *Jane Davies* begotten,) for her Life, without Impeachment of Waste; remainder to the use of the aforesaid Trustees and their Heirs during the life of the Plaintiff *Jane Fuller*, in Trust, to preserve the contingent Uses and Estates thereafter devised; with remainder to the use of the first and every other Son of the Body of the Plaintiff *Jane Fuller*, successively in Tail Male; with remainder to the use of the first and every other Daughter of the Body of said *Robert Knight*, successively, according to their respective seniorities, in Tail Male; with remainders over:—That said *Robert Earl of Catherlough* executed a Codicil to his said Will, bearing date the 24th day of *February* 1772, and thereby, after reciting that he had agreed with *Newsame Peere*, Esq. for the purchase of an Estate situate in the County of *Warwick*, and directing that the Purchase should be completed, and the Estate conveyed to the Uses in his said Will contained, concerning the Manors and other Hereditaments thereby devised, did in all other respects ratify and confirm his said Will:—That said Testator departed this life on or about the 30th day of *March* 1772, without having revoked or altered his said Will, except as same is altered by said Codicil, and without having revoked or altered the said Codicil, leaving said *Robert Knight*, Plaintiff *Henry Raleigh Knight*, Plaintiff, *Jane Fuller*, then *Jane Knight*, and *Henrietta Matilda Knight*, his only Children or reputed Children by the said *Jane Davies*, him surviving:—That said *Robert Knight*, on or about the 12th day of *June* 1791, intermarried with

1819.

KNIGHT
and others
v.
KNIGHT.

1819.

KNIGHT
and others
v.
KNIGHT.

the Honourable *Frances Dormer*, Spinster, now *Frances Knight*, his Wife; and there was Issue between them; one son only, named *Harry Knight*, who hath since died an Infant and without Issue, and two Daughters, now living, namely, Plaintiff *Frances Elizabeth Knight*, who hath attained her age of twenty-one years, and Plaintiff *Georgiana Knight*, and no other Child; and Plaintiff *Jane Fuller*, then *Jane Knight*, intermarried with *Benjamin Bond Hopkins*, Esq. and said *Benjamin Bond Hopkins* hath since departed this life without Issue by Plaintiff *Jane Fuller*; and said Plaintiff *Jane Fuller*, then *Jane Hopkins*, afterwards intermarried with and is now the Wife of Plaintiff *Charles Fuller*, and there is no Issue by Plaintiff *Jane Fuller*:—That Plaintiff *Henry Raleigh Knight* some time since married, and hath Issue by the said Marriage, Plaintiff *Charles Raleigh Knight*, his only son, and Plaintiffs *Julia Knight* and *Caroline Emily Knight*:—That in or about the year 1804, differences arose between said *Robert Knight* and said *Frances* his Wife, and thereupon they agreed to live separate and apart from each other, and not to cohabit together, and that accordingly, by an Indenture bearing date the 4th day of *July* 1804; and made and duly executed by and between said *Robert Knight* and said *Frances* his Wife of the one part; and the Right Honourable *Charles Lord Dormer*, Baron of *Wenge*, in the County of *Bucks*, of the other part; reciting, among other things, the aforesaid Agreement between said *Robert Knight* and *Frances* his Wife, to live separate, and not to cohabit together; and that for making a competent provision for said *Frances Knight* during such Separation, said *Robert Knight* had agreed as thereafter mentioned: It was among other things witnessed, that said Plaintiff *Robert Knight* did

CASES IN CHANCERY.

5

covenant with said *Charles Lord Dormer*; that he said Plaintiff *Robert Knight* would yearly pay and allow unto said *Charles Lord Dormer*, his Executors and Administrators, during the joint lives of said Plaintiff *Robert Knight*, and *Frances* his Wife, one Annuity of 800*l.*, the payment of which Annuity was secured as in said Indenture mentioned; which Annuity of 800*l.* was afterwards reduced to an Annuity of 400*l.* by virtue of the Provisions contained in a Deed of De-feazance, bearing even date with the now stating Indenture; and it was by the now stating Indenture Declared and Agreed, that said Annuity of 800*l.* was secured and limited to said *Charles Lord Dormer* upon Trust, and to the intent that said *Charles Lord Dormer*, his Executors, Administrators or Assigns, should pay, apply, and dispose of the same for such purposes as she the said *Frances Knight* should from time to time (notwithstanding her Coverture) appoint, and for want of such appointment, into her own hands for her sole and separate Support and Maintenance, with a Proviso for preventing said *Frances Knight* from endeavouring to compel the said Plaintiff *Robert Knight* to cohabit with her, or pay and allow her, while they lived separate, any sum of Money, except the aforesaid Annual Sum of 800*l.* which hath been since reduced as aforesaid, or occasion to him any further or other expense:—That ever since the aforesaid Agreement for Separation took place between the said Plaintiff *Robert Knight*, and said *Frances* his Wife, in said year 1804, they have lived separate and apart from each other, and have not at any time since cohabited together; and said Plaintiff *Robert Knight* has not at any time since said Separation took place had access to his said Wife, nor been in her company or presence, either alone or

1819.

KNIGHT
and others
v.
KNIGHT.

1819.

KNIGHT
and others,
v.
KNIGHT.

together with any other person or persons, but they have continued to live apart upon the terms expressed in the herein stated Indenture of Separation, as altered by said Indenture of Defeazance, of even date therewith:—That on or about the 7th day of *October*, in the year 1813, said *Frances Knight* brought forth and was delivered of a Male Child, being the Defendant herein-after named:—That said *Frances Knight* did on or about the 21st day of *May* 1814, procure said Child to be baptized and registered in the Parish Church of the Parish of *St. Mary-le-Bone* in the County of *Middlesex*, by the name of *Henry Charles*; and that in the Register of Baptisms of said Parish, the Baptism of said Child is registered in the words and figures, or to the purport and effect following; (that is to say) Baptisms solemnized in the Parish of *St. Mary-le-Bone* in the County of *Middlesex*, in the year 1814:

When Baptized.	Child's Christian Name.	Parents Christian Names.	Surname.
1814: May 21.	- Hen ^y Charles	- Chas. & Honor.	} Knight.
		Frances	

Abode.	Quality, Trade, or Profession.	By whom the Ceremony was performed.	Born.
St. Mary-le-Bone.	Esquire.	Rev. Dr. Heslop.	7th Oct. 1813.

That said Child has been, and is called or known by the name of *Henry Charles Knight*; and the said *Henry Charles Knight* is now, or late was residing with said *Frances Knight*, at or near *Gerard's Cross*, in the County of *Bucks*:—That under and by virtue of said Will and Codicil of said *Robert Earl of Catherlough* (and of a certain Act of Parliament) directing a sale of part of the Hereditaments devised by said Will and Codicil, the Money arising from such sale to be laid out in the purchase of Estates, to be settled to the Uses of said

CASES IN CHANCERY.

7

1819.

KNIGHT
and others,
v.
KNIGHT.

Will, the aforesaid Hereditaments of said *Robert Earl of Catherlough*, not directed to be sold by said Act of Parliament, and the Estates purchased and to be purchased with the Money arisen and to arise from such sale as aforesaid, stand limited and assured to the use of Plaintiff *Robert Knight*, for his life ; and, upon his decease without Issue Male, to the use of Plaintiff *Henry Raleigh Knight*, for his life, with remainder to the use of *Charles Raleigh Knight*, in Tail Male, with remainder to the use of Plaintiff *Jane Fuller* for her life, with remainder to the use of her first and other Sons, successively in Tail Male, with remainder to the use of Plaintiff *Georgiana Knight* in Tail Male, with remainder to Plaintiff *Julia Knight* in Tail Male, with remainder to the use of *Caroline Emily Knight* in Tail Male, with the ultimate remainder to Plaintiff *Robert Knight* in Fee ; and Plaintiffs ought, according to their respective interests aforesaid, and upon the happening of the successive events aforesaid, successively to enter upon and quietly enjoy the aforesaid Hereditaments.

The Bill then charged, that Defendant gives out and pretends that he is lawful Son of the body of Plaintiff *Robert Knight*, by said *Frances Knight* his Wife, and as such entitled to an Estate Tail in the aforesaid Hereditaments, prior and in preference to the Plaintiffs ; whereas Plaintiffs expressly charge, that Defendant is not the Son of Plaintiff, said *Robert Knight* ; and that said *Robert Knight* had no access to, nor with, nor in the presence of said *Frances Knight*, within the period of ten months next preceding the birth of said Defendant, nor at any time since the year 1804 : that several witnesses, who can prove the title of Plaintiffs, are very old and infirm, and Plaintiffs are in great danger of

1819.

KNIGHT
and others,
v.
KNIGHT.

being deprived of their testimony by their deaths; and said Defendant threatens, and intends upon the death of said Plaintiff *Robert Knight*, to dispute the Right of Plaintiffs, and the said several other Parties immediately entitled to the said Estates, and the reversionary Interest of the said Plaintiff *Raleigh Knight* therein, and to lay claim to them himself. And Plaintiffs *Henry Raleigh Knight, Charles Robert Knight, Charles Fuller, and Jane* his Wife, and *Frances Elizabeth Knight*, further show, that they, in or about *Trinity Term 1814*, filed their Bill, stating and charging the several matters aforesaid, and thereby praying, as hereinafter is prayed; but, that since the close of the execution of the Commission, which was issued and granted for the purposes after mentioned, they have discovered divers various and other facts of which they were then ignorant, the testimony whereof is very material to be perpetuated.

The *Prayer* of the Bill was, That Defendant might answer the premises; and that the several Witnesses, to prove Plaintiffs said Title and the Matters aforesaid, might be examined concerning the same; and that their testimonies might be perpetuated and recorded in this Court; and that one or more Commission or Commissions might issue out of and under the Seal of this Court, for the aforesaid purposes.

To this Bill, the following Demurrer was put in :—

“ This Defendant not confessing, &c. doth demur thereto; and for cause of demurrer says, that it appears by the said Plaintiffs own showing by their said Bill of Complaint, that the said Plaintiffs are not entitled to the discovery or relief prayed by their said Bill against this Defendant; wherefore, &c.”

Mr. Agar, and Mr. Roupell, in support of the Demurrer.

It may be questioned whether persons can file two Bills to perpetuate testimony; are they to examine Witnesses examined before? They may have acquired by secret means, a knowledge of what the Witnesses swore, and by tampering with them, may now wish to re-examine them. The former Bill has not all the same Parties as this; the new Parties are connected in privity of Estate, and might, without filing this Bill, have had all the benefit of the Evidence taken on the former Bill. They say, that since the close of the Commission under the first Bill, they have discovered divers various and other Facts material to be perpetuated; but they do not say what Facts, or to what they mean to examine, or whom they mean to examine. In *Bartlett v. Hawker*, (b) not reported, a Demurrer to such a Bill as this was allowed, because the facts were not stated as to which the Plaintiffs meant to examine witnesses. On this Bill they might go into the widest examination possible. On this part of the case, they cited *Gill v. Hayward* (c), and *Cresset v. Mitton* (d).

1819.
KNIGHT
and others,
v.
KNIGHT.

Mr. Wingfield, Mr. Heald and Mr. Willis, contra:—

It is not necessary the Bill should state the facts to

(b) According to the Reporter's MS. Note of that Case; it was argued on the 8th and 22d of May 1805; and the Lord Chancellor on the first argument observed, "That great danger might arise from such Bills, unless the facts to which the Plaintiff wished to

examine, were particularly stated in the Bill;" and on that ground, after consideration, he ultimately allowed the Demurrer.

(c) 1 Vern. 312.

(d) 1 Ves. jun. 449. S. C.
3 Bro. C. C. 449.

1819.

KNIGHT
and others,

v

KNIGHT.

be examined to; if nothing is to be examined to but that which is stated in the Bill, what use is there in the general interrogatory as to what the Witness knows on the subject? It has never been decided that no more than one Bill can be filed to perpetuate Testimony. Any person, however slender his Interest may be, is entitled to file such a Bill (e); it is not necessary to show collusion as to the first Bill, to entitle Parties to file a second Bill. If no mention had been made of the first Bill in this second Bill, it is clear these new Parties might have sustained such Bill, they being the Children of *H. Knight*, who have come *in esse* since the filing of the former Bill; the mention of the former Bill does not vitiate the present.

THE VICE-CHANCELLOR:—

The present question is whether, upon a Bill to perpetuate Testimony, the examination of Witnesses having been compleated, and the Commission closed, the Plaintiffs can sustain a Supplemental Bill for the further examination of Witnesses, upon the ground that new material Facts have been discovered since the filing of the former Bill, without stating in the Bill what these Facts are.

I consider that the addition of new Plaintiffs makes no difference, because, by incorporating themselves with the original Plaintiffs, they adopt the former proceedings, and, for the present purpose, stand in the same situation. If new evidence had been discovered after the Commission closed, as to Facts stated in the

(e) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

CASES IN CHANCERY.

11

Original Bill, the proper course would have been, not to file a Supplemental Bill, but to make an application to the Court for permission to examine the new Witnesses; but where the discovery is of new Facts, and not of new evidence to former Facts, and admitting that a Supplemental Bill could be filed in this Case, I am clearly of opinion, that such Bill must state what these Facts are, for otherwise the Defendant cannot be prepared to meet the new Case.

1819.

KNIGHT
and others,
v.
KNIGHT.

Demurrer allowed.

CRIPPS v. WOLCOTT and others.

1818.

27th November.

1819.

18th January.

THE Bill stated, That under the Wills of *Mary Simons* and *Ann Simons*, deceased, *Deborah Saunder*, the late Wife of *Arthur Saunder*, deceased, was authorized and empowered to dispose, by her Will, of the principal Sum of 540*l.* being the remainder of a Sum of 600*l.*, after deducting therefrom the Duty payable upon Legacies; and that on or about the 9th November 1811, said *Deborah Saunder*, pursuant to said Power, made and published her last Will and Testament in writing, of that date, which was executed by her in the presence of, and attested by, three Witnesses; and thereby, after reciting, amongst other things, that said

Words of Survivorship are to be referred to the period of division and enjoyment, unless there be special intent to the contrary.

1819.

CRIPPS

v.

WOLCOTT

and others.

Sum of 540 *l.*, being the remainder of 600 *l.* after such deduction as aforesaid, was bequeathed to her, and at her sole disposal, by the respective Wills of said *Mary Simons* and *Ann Simons*, said Testatrix gave, directed, appointed, and bequeathed unto her Friends the Defendants, *John Wolcott*, of, &c. and *John Agg*, of, &c. the third part or share of her, said Testatrix, of and in certain Estates therein mentioned, and all other the real and personal Estate and Effects over which she then had, or at the time of her decease should have, any power in Law or Equity, to hold to them, their Heirs, Executors, Administrators and Assigns, according to the nature of the same respectively, in Trust, to pay to, or permit and suffer her Husband, said *Arthur Saunder*, to have and enjoy the Rents, Interest, Dividends, Produce and Profits thereof during his natural Life; and upon the decease of her said Husband, the Testatrix directed that said Sum of 540 *l.*, and all other her Personal Estate, should be equally divided between her two Sons *Arthur Saunder* and *George Saunder*, and Plaintiff *Ann Cawley Cripps*, her Daughter, and the Survivors or Survivor of them, share and share alike; and she appointed her Son *George Saunder*, sole Executor of her said Will:—That the Testatrix afterwards died, leaving said *Arthur Saunder* the elder, her Husband, surviving her; and that upon her death said *George Saunder* proved her Will, and that said Sum of 540 *l.* was invested in the purchase of 830 *l.* 15 *s.* Three-per-cent. Bank Annuities; which last mentioned Sum was transferred into the Names of said *John Wolcott* and *John Agg*, and that the same was standing in their Names, upon the Trusts declared by said Testatrix's Will of said Sum of 540 *l.* therein mentioned:—That *Arthur*

Saunders the elder, received the Dividends which accrued upon the said Sum of 830*l.* 15*s.* Three-per-cent. Annuities, during his Life; and that said *Arthur Saunders*, the Son of said Testatrix, died in the life-time of the said *Arthur Saunders* the elder, intestate and unmarried; and that in or about *October* 1816, said *Arthur Saunders* the elder died, leaving *George Saunders*, and the Plaintiff *Ann Cawley Cripps*, surviving; and that on the death of said *Arthur Saunders* the elder, said *George Saunders* and the Plaintiff *Ann Cawley Cripps*, under the Trusts of the Will, became entitled in equal Moieties to the said Sum of 830*l.* Three-per-cents.

1819.

CRIPPS

v.

WOLCOTT
and others.

The *Prayer* of the Bill was, That the Plaintiff *Ann Cawley Cripps* might be declared to be so entitled; and that the Defendants *Wolcott* and *Agg* might be decreed to transfer the Moiety of the Plaintiff *Ann Cawley Cripps*, into the Name of the Plaintiff *Thomas Cripps*, and to pay to the Plaintiff the Dividends which had accrued due upon such Moiety, since the death of *Arthur Saunders* the elder.

George Saunders, by his *Answer*, claimed a Moiety of the Sum of 830*l.* 15*s.* Three-per-cents.

The Defendant *Davis Whately*, as the Executor of the deceased *Arthur Saunders* the Son, by his *Answer*, insisted that the Bequest to the Survivors of the Children of the Testatrix did not refer to the death of *Arthur Saunders* the elder, but to the death of the Testatrix; and that the Share of *Arthur Saunders* the Son, in the Sum of 830*l.* 15*s.* Three-per-cents. in which the same was invested, became vested in him, and

1819.

CRIPPS

v.

WOLCOTT
and others.

transmissible to his Representatives, notwithstanding his death, in the life-time of *Arthur Saunder* the elder.

Mr. *Wilbraham*, for the Plaintiffs:—

Mr. *Treslove*, in the same interest, for the Defendants *Agg* and *Saunder*:—

The words in this Will, giving a Life Interest in the sum of 540*l.* to *Arthur Saunder* the Father, and upon his decease, directing the same to be equally divided between the Testatrix's two Sons and her Daughter, and the Survivors or Survivor of them, means, among such as shall survive the Tenant for Life when the Division was to take place; and, consequently, as *Arthur Saunder*, one of the Testatrix's Sons, died in the life-time of the Tenant for Life, his Representative has no claim. They cited *Stringer v. Phillips* (f), *Bindon v. Lord Suffolk* (g), *Hawes v. Hawes* (h), *Roebuck v. Dean* (i), *Russell v. Long* (k), *Daniell v. Daniell* (l), *Brown v. Bigg* (m), *Jenour v. Jenour* (n).

Mr. *Koe*, for the Defendant *Whately*:—

The words of Survivorship relate to the death of the Testatrix, not to the death of the Tenant for Life. *Brown v. Bigg* (o) is precisely this Case. As, therefore, *Arthur Saunder* the Son, survived the Testa-

(f) 1 Eq. Cas. Abr. 293.

(k) 4 Ves. 551.

(g) 1 P. Wms. 96. 1 Bro.

(l) 6 Ves. 297.

P. C. 189.

(m) 7 Ves. 279.

(h) 1 Ves. 13.

(n) 10 Ves. 562.

(i) 2 Ves. jun. 265.

(o) 7 Ves. 279.

tor, his Representative is entitled to one-third of the Stock.

1819.

CRIPPS

v.

WOLCOTT
and others.

The VICE-CHANCELLOR, after stating the Case:—

It would be difficult to reconcile every Case upon this subject. I consider it, however, to be now settled, that if a Legacy be given to two or more, equally to be divided between them, or to the Survivors or Survivor of them, and there be no special intent to be found in the Will, that the Survivorship is to be referred to the period of division.

If there be no previous interest given in the Legacy, then the period of division is the death of the Testator, and the Survivors at his death will take the whole Legacy. This was the Case of *Stringer v. Phillips*.

But if a previous Life Estate be given, then the period of division is the death of the Tenant for Life, and the Survivors at such death, will take the whole Legacy. This is the principle of the cited Cases of *Russell v. Long*, *Daniell v. Daniell*, and *Jenour v. Jenour*.

In *Bindon v. Lord Suffolk*, the House of Lords found a special intent in the Will, that the division should be suspended until the Debts were recovered from the Crown; and they referred the Survivorship to that period. The two Cases of *Roebuck v. Dean*, and *Perry v. Woods (p)*, before Lord Rosslyn, do not square with the other Authorities.

1819.

CRIPPS

v.

WOLCOTT

and others.

Here, there being no special intent to be found in the Will, the terms of Survivorship are to be referred to the death of the Husband, who took a previous Life Estate.

1803.

EAST INDIA COMPANY v. KEIGHLEY.

9th, 14th, 16th,
19th, 20th Dec.

THE Proceedings in this Cause are extremely voluminous, but from the course which it took, it will not be necessary to state all the circumstances in detail.

1806.

25th March.

In the following Speech of Lord *Eldon*, in the House of Lords, the substance of the Bill and Answer is stated,—the Decree of Lord *Rosslyn*,—the nature of

1819.

15th, 18th, 19th
January.

the Master's Report,—the Exceptions thereto—the Order made by Lord *Rosslyn* on the hearing of the

On Appeal to
the House of
Lords, it was

held, that if the Master reports that certain admissions were made before him, and exceptions are taken to such statements of admissions in the Report, the Court cannot allow the Exceptions, without consulting the Master as to the fact of such Admissions; and further, that on Exceptions the Decree cannot be varied.

On the re-hearing of the Exceptions before the Vice-Chancellor, it was held, that the Defendant having by his Answer admitted a profit of 20,000 l. on certain Contracts, and the Decree declaring him answerable for the same, as a Trustee for the Plaintiffs, and for any Profit he might be found to have made; the Master, on taking the accounts between the Parties (which were so taken at the instance of the Plaintiffs, in hopes of proving that he had received a larger profit than the 20,000 l.) was not authorized to report that the Defendant, instead of being indebted to the Plaintiffs to the amount of 20,000 l. in respect of profits received by him, was a Creditor on the Plaintiffs to the amount of 67,000 l., no evidence being admissible to contradict the answer of the Defendant.

Exceptions,—and the grounds on which the *House of Lords*, on Appeal, reversed that Order. Lord *Erskine* then held the Seals, but as the case was argued before his appointment, his Lordship does not appear to have given any opinion upon it. The subsequent proceedings, on the re-hearing of the Exceptions before the *Vice-Chancellor*, will afterwards be noticed.

1819.
EAST INDIA
COMPANY
v.
KEIGHLEY.

LORD ELDON:—

My Lords,

This is an Appeal from an Order of the Court of Chancery of the 1st of August 1800, and it appears to me, that if your Lordships could permit that Order of the Court of Chancery to stand, you would endanger the principles of the Court. A Bill in this Case was filed by the *East India Company* against Mr. *Keighley*, and it stated, as Bills filed by that Company generally do, first, the exclusive right which the *East India Company* have of trading between the *Cape of Good Hope* and the *Streights of Magellan*. It then stated, that Mr. *Keighley* had been a Servant of the Company, first as a Writer, at a certain Salary, then as a Factor, also at a certain Salary; and then it proceeded to state an Indenture of Covenants, which that Gentleman, while in the situation of a Factor, entered into with the Company; and it is in the minds of your Lordships, that by that Indenture of Covenants, which is usual, the persons holding these situations engage to the utmost of their skill and ability to serve the *East India Company*, to content themselves with their Salary, to make no profit whatever, except such profit as the Company allows them to make; to enter into no Trade except that allowed by the Company themselves; that in all their transactions of Bargain and Sale with the

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

Company, they will charge the Company with no more than they themselves pay; that they will keep regular Books of Account, and they expressly undertake, by this Covenant, that whatever Accounts are settled as between them and the servants of the Company abroad, those Accounts shall always be considered as open Accounts between them and the Directors at home. These obligations imposed upon a person when he enters into the situation of a Factor, are obligations, which by the usage of the Company, go along with him in all the subsequent situations in which he afterwards becomes engaged. It appears that Mr. Keighley, down to the year 1778, having been in some inferior situations in the service of the Company, was appointed Resident at their Factory at *Banleah*, in the province of *Bengal*, with a certain stipulated Salary, as his reward and his emolument, having also the privilege of trading on his own account. The Bill then went on particularly to state, that at the time Mr. Keighley was so appointed, the Company were possessed of very large, extensive and valuable filature Works at *Banleah*, where they had been in the habit of making a large annual provision of filature wound, and of Bengal wound raw Silk, which was to form an Investment for the Company's service; the filature wound Silk being provided at their own cost, and the *Bengal* wound Silk at a settled price by contract. The Bill goes on to state that it became the duty of Mr. Keighley to conduct the Works, and also to receive proposals for the investment of *Bengal* Silk, and to obtain the same at the lowest and best prices, and to point out any frauds which might be attempted by the persons providing it; and it was particularly alleged, that he was to do this without taking any com-

mission, but that he was to content himself with that which was his stipulated and covenanted Salary, doing the best in all respects for the Company, having engaged so to do without any further profit or emolument.

1819.
EAST INDIA
COMPANY
v.
KEIGHTLEY.

My Lords, when this Gentleman went first to his Residency, the Bill states, that he undertook, himself, not by entering into Contracts with third persons, but undertook, himself, by the Machinery he had at this place, to provide the Investment for 1779 and 1780; and the Bill particularly charges, that he represented to the Company that the expenditure, which was 413,691 rupees, was to the amount of 721,001 rupees; that the work was done at much less expense; and that he charged the Company vastly more than what, within the meaning of his Covenant, he ought to have charged the Company, thereby making a profit to himself. The Bill also states, that he had entered into Contracts with persons, with whose names it is not necessary to trouble your Lordships, (call them A. and B.) for the purpose of explaining what I have to offer for your Lordships' consideration; whereas in truth he did not enter into a Contract with these persons, but that they worked under him as his servants; that the Contracts which he entered into in their names he entered into himself, and by entering into those fictitious Contracts he also gained considerable Emolument and great Profit, contrary to the faith of his Covenants and Engagements. After those Contracts had been entered into, the Bill then represents, that he stated to the Company, that in future the Concern was to be carried on under his own management, and that he himself entered into a Contract with the Company for providing them with this article of Invest-

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

them; and he admits that Profit was made upon them. With respect to the subsequent Investments of 1781 and 1782, this Gentleman insists in his Answer that he contracted fairly with the Company; he admits, however, that he did make a Profit by that Contract also; and having therefore, as your Lordships observe, very distinctly stated this by his Answer—distinctly admitting that upon all these Transactions there were Profits—if the *East India Company* had contended for that point by their Bill, that they were entitled to have those Profits accounted for to them, and if the *East India Company* had been disposed, on the original hearing of this Cause, to have prayed for them, they would have had nothing to do, but, at the original hearing of the Cause, to pray, that an Account might be taken of those Profits; to have argued the reasonableness and the legality of that Demand, upon the Principles and the Facts stated on the Record; and if they could have succeeded in such a Demand so shaped, your Lordships may suppose they would have succeeded in such a Demand so shaped. It was equally competent to the *East India Company* to proceed with a much larger view of relief: they might pray a general Account of all Dealings and Transactions by Mr. Keighley; and if they thought proper so to do, the Court would not refuse it to them. They chose for themselves, and they thought proper to ask at the hands of the Court of Chancery, that which Lord Loughborough was pleased to give them by a Decree, bearing date the 7th of July 1796, whereby it was ordered and decreed,—That it be referred to Mr. Simeon, one of the *Masters* of the High Court of Chancery, to take an Account of all Dealings and Transactions between the Plaintiffs, the *East India Company*, and the Defendant, in respect to the provision

of filature Silk by the Defendant, as the Plaintiffs' Resident at *Banleah* in the *East Indies*, for the investment of the years 1779-80, and 1780-81, in the Pleadings mentioned; and also in respect to the Contracts entered into by *Datterham Ghose* and *Anunderam Sircar*, for the provision of *Bengal* wound Silk, in the Pleadings also mentioned; and also in respect to the Contract, bearing date the 13th day of *June* 1781, entered into by the Defendant, for supplying the Plaintiffs with filature Silk and *Bengal* wound Silk, in the Pleadings mentioned. And then the Court say, that the Defendant was to be considered as a Trustee in respect of the said several Contracts, as well those entered into by the said *Datterham Ghose*, and *Anunderam Sircar*, as that entered into by the Defendant himself: the Principle of this being, that the Evidence, as the Court thought, showed that the Contracts which had been entered into with *Datterham Ghose*, and *Anunderam Sircar*, were really Contracts entered into with the Defendant himself, the Work being done by him; and the Court being of opinion, that the Contract the Defendant himself had entered into, was a Contract of which he ought not to be allowed to take the benefit as a contracting Party, but that the whole Benefit he had made, as the contracting Party, should result to the Company. I state not now, whether this was right or wrong, but only that it was the Principle upon which the Court proceeded. Then there is a general Direction, that the Parties should have all just Allowances, particularizing the Allowance for the Loss in respect of exchange of *Sicca* rupees and *Sonant* rupees: and there was a Reservation of the Costs of the Suit, and of further Directions, till the *Master* had made his Report. Your Lordships will perceive that, though

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

this Decree gave much more ample and much larger relief, having declared that the Party was a Trustee only in the Contracts entered into with others, as well as a Trustee in the Contract entered into with himself, it furnished a Principle, on which the *East India Company* would have been thoroughly enabled and entitled to have gone before the *Master*, when this Account was taken, and to have said, "This Mr. *Keighley* being a Trustee of these Profits, we have nothing to do but to charge that the Profits were to such an Amount; and we can prove that the Profits were to such an Amount, because the Defendant has, by his Answer, admitted that the Profits were to such an Amount:" and with that they might have contented themselves, if they thought proper. That was not, however, the course they pursued; but they carried in to the *Master*, according to the Paper on your Lordships' Table, several charges of Money advanced on account of the Investments, between 1778 and 1782; and then they left him, after carrying in that general charge, to discharge himself as well as he could.

My Lords, when I before called your Lordships attention to the circumstance, that the *East India Company* had desired by their Bill that the Defendant should pay to them above 200,000*l.*, together with Interest at Ten-per-cent, your Lordships will be surprised to find, that the result of the Account taken by the *Master*, is not that the *East India Company* have a demand upon him, but that he is a Creditor of theirs to upwards of 60,000*l.* To the *Master's* Report stating that, the *East India Company* took a great variety of Exceptions. I should be sorry if my view of the case lead me to state to your Lordships what they all are, but the Exceptions

amount to 91 in number. On the other hand, Mr. *Keighley* took Exceptions, and the Cause not being set down, as I understand, for further Directions, an Order was made upon the hearing of these Exceptions, which I consider, according to my knowledge of the subject, as entirely contrary to the Forms of the Court; and I think I shall satisfy your Lordships, that the Forms of the Court are founded on an attention to what Justice requires should be the Forms of the Court. My Lords, the *Master*, after stating that this was the Charge made by the Company upon Mr. *Keighley*, proceeds to state this: he says, "I have, by consent of both Parties, proceeded upon this Account as an open Account, giving credit to the Defendant for all just Demands, in respect of Silk bought and manufactured for the Complainants in the years before mentioned, and for such just Allowances as he appears to me to be entitled to; and debiting him with the Monies already received in respect thereof: but as many of the Claims of Credit made by the Defendant, and which are disputed by the Complainants, depend, in part, upon conclusions to be drawn from a variety of Facts and Circumstances growing out of the relation which for many years subsisted between the Complainants and the Defendant, as their Servant in *India*; and the substantiating of other disputed Claims made by the Defendant, depend upon the kind and degree of Evidence which, under the circumstances of delay attending the commencement and prosecution of this Suit, ought to be deemed sufficient to substantiate such Claims; it appears to me proper, first to state a short and connected detail of those Facts and Circumstances, admitted or proved before me, which have influenced my Judgment." The *Master* here appears to be stating this very important Fact, that both

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

Parties had agreed before him, that this Account should be taken as an open Account. He then goes on to state circumstances which he conceived it material to introduce to the attention of the Court, in order that the Court might weigh his Opinion, formed upon the effect of the Evidence, which led him to conclude either for or against the Defendant, with respect to the separate Claims which Mr. *Keighley* brought forward and insisted were just and fair Claims ; I will not go through all this Report of the *Master*, much less shall I give your Lordships my opinion, whether his conclusions from the circumstances were just: but the *Master* having stated that the Parties had agreed that it should be an open Account, goes on also to state, in a great many parts of his Report, a great variety of Facts, which he asserts to the Court were admitted by the Parties before him ; and I lay particular claim to your Lordships' attention to this part of the Case, because it appears to me to involve a question of great magnitude, in reference to the Proceedings of the Court of Chancery. The *Master* conceiving that he was at liberty to go through the whole of these Transactions in the same way that he would examine any other Transactions where the Accounts were altogether open, and asserting that he did this by the consent of the Parties, he proceeds to enquire into the Expenditure necessarily attending this Investment, by the purchase of cocoons, tools, and all the other things necessary in the investment of Silk ; and he concludes on each Investment from time to time, and states, that taking the Account, and making Mr. *Keighley* the just Allowances, turns the Balance from the large Sum I before mentioned, to the Sum he himself reports: thereby, as your Lordships see, establishing this—which also seems to me to call for particular

attention from your Lordships—that the Answer of the Defendant, I do not say is false, for that is a hard word, but that the Answer of the Defendant is founded in mistake, when the Defendant has admitted, in four or five different parts of that Answer, that on each of these Investments he actually did make considerable Profit; let the nature of the Admission before the *Master* be whatever it might have been, it would be a very difficult thing, according to my conception of the Proceedings of the Court of Chancery, to say, that the *Master*, on any hypothesis, on any inference he can draw from any circumstances before him, which are equivocal as to their effect, is at liberty to say, that their effect shall be the direct contrary to that which the Defendant has sworn to be the truth; for I take the principle to be this, that an Answer in Chancery, so long as it stands such in its Contents, as it was originally framed and sworn to, must be taken to be true. There are many Cases in which an Individual is allowed, on an application to the Court of Chancery, to reform his Answer; and in some instances, to take it off the File; but I apprehend that that can only be done (and it would be a dangerous practice if it could) by a special Application to the Court, satisfying the Conscience of the Court, how it comes that that should stand in the form of a solemn Deposition, which is now alleged to be founded in mistake: but I do not apprehend, in my view of the constitution of that Court, that it is competent to any *Master* to do that, but it must be done by the Authority of the Court itself. My Lords, these two singularities occur, then, in the present Case:—In the first place, that this is stated by the *Master*, and it forms the subject of a vast number of the Exceptions, that the *Master* has reported to the Court, that the

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

of before,—they took all the Exceptions together; and though I think the *Master* has in many points exceeded his authority, and has rather been informing the Court what the Court ought to do, than attending to the execution of the power given to him, I cannot, for one, sanction such a course. The course which the Court took was this:—All the Exceptions, every one of them, taken on the part of the *East India Company*, were allowed, and the Exceptions taken on the part of Mr. *Keighley*, were disallowed; and then, though the Cause was not set down for further directions, and though the *East India Company* had prayed, on the original Hearing, a general Account of all Dealings and Transactions; and though the *East India Company*, when they carried in their Charge, did not confine themselves, as they might have done, notwithstanding the generality and amplitude of the terms of the Decree, to that which was admitted by the Defendant to be due; and though the Party was kept in the *Master's* Office from the date of that Decree till these Exceptions were heard, the Court then, without the Cause being set down for further directions, says, that the *East India Company* having consented to waive the whole Account, except so much as is admitted by the Defendant in his Answer, to have been the Profits made by him, the Cause is referred back to the *Master* to compute that, and to compute the Interest upon those Profits, and the Court then reserves further Directions and Costs. Now, it would be obvious to your Lordships, that if the *East India Company* thought proper to make this large Claim in the first instance, the Decree they took in the first instance, was a Decree, to the benefit of which the Defendant was entitled as well as they; and notwithstanding the *Master* did a great deal on

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

that Decree which he was not entitled to do, but with the consent of the Parties, if it be true, as the *Master* states, that they agreed this should be considered as an open Account, each Party as against himself, waived all the strict rules which could arise out of the language of the Decree; and to be sure, if it were fit that the Exceptions should be overruled for the purpose of having the Account directed in a different way, that was not a question which ought to be discussed, till they could inform the Court what had passed in the *Master's* Office; and why it had become just, at the time these Exceptions were heard; if it could be made out to have been just, that they should insist on what they had not before insisted to be the justice of the Case; for the *East India Company* originally conceiving that above 20,000 *l.* was due to them, carried in a Claim which put the Defendant under all possible difficulties to discharge himself; and they then waived their right to a smaller sum of Profits, and prayed that the *Master* would allow them this large Sum, except so much of it as the Defendant, by strict proof, could discharge himself of. It happens that the Defendant has, by what the *Master* considers as proof, (though I am very far from agreeing with him in what was proof, but by what the *Master* considers as proof,) not only got rid of his Balance, but has constituted a Demand, which, under this Decree, the *East India Company*, if this Demand cannot be shaken, will be bound to pay to him upwards of 60,000 *l.* sterling; then the Chancellor, having overruled all his exceptions, without enquiring, in the ordinary way of enquiring, of its own Officers, how much of that which was stated to be admitted really was admitted, and how much of that which he stated to be agreed really was agreed, cut the whole down, without giving the Defendant even the benefit of Costs; he cut

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

down the effect of all these intermediate proceedings, and without admission or re-hearing, or even notice that such a thing was to be asked of the Court, gives them that very Decree which they might have asked in the first instance, on the foot of the Answer, before these proceedings were had.

It appears to me, my Lords, that as the Cause is before us, it is quite impossible that we can sanction such a proceeding with respect to a Report from the *Master's* Office; and that whatever may be necessary should be done, in order that justice may be done, this is not the course—I am afraid that nothing can be done, but this, to propose to your Lordships, (which I propose to do in a day or two in due form,) to reverse that Order which was made upon the hearing of the Exceptions, and to call upon the Court to hear the Exceptions regularly, and to decide them; and if either the one Party or the other is of opinion that in the circumstances in which the Cause stands, and regard being had to the Proceedings which have taken place in the Cause, that the original Decree should be altered, by directing the Account upon the foot of the Answer, it is competent for them to have the Account directed on different principles; but it must be asked in a regular manner, and I should submit that they should be left at liberty to ask it in a regular manner, either by petition, re-hearing, or by any other course which the Forms of the Court may prescribe. Having now stated to your Lordships the general purport of what I propose, considering it of very great consequence to be extremely cautious that the practice of the Court should be attended to, I will now, with your Lordship's permission, propose that the further consideration of this shall be adjourned to Friday next.

when I shall give in what I propose as the Judgment of this House.

1819.

The following Order was afterwards made :—

EAST INDIA
COMPANY
v.
KEIGHLEY.

Die Martis, 1^o Aprilis 1806.

“ After hearing Counsel, as well on *Friday* the 9th, *Wednesday* the 14th, *Friday* the 16th, *Monday* the 19th, as *Tuesday* the 20th days of *December* 1803, upon the amended Petition and Appeal of *James English Keighley, Esquire*, and of the Right honourable *George Lord Kinnaird, Josiah Barnard, Thomas Kemble, John Atkins, Andrew Stirling*, and *Robert Steele*, Assignees of the Estate and Effects of the said *James English Keighley*, under a Commission of Bankrupt, complaining of an Order of the Court of Chancery of the 1st day of *August* 1800, and praying that the same might be reversed; or that the Appellants might have such other relief in the premises, as to this House, in their Lordships great wisdom, should seem meet: As also, upon the Answer of the united Company of Merchants of *England* trading to the *East Indies*, put in to the said Appeal; and due consideration had this day of what was ordered on either side in this Cause, it is Ordered and Adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the said Order of the Court of Chancery of the 1st day of *August* 1808, complained of in the said Appeal, should be, and the same is hereby reversed; but without prejudice to what the said Court may think proper to order thereafter, with respect to the allowing or overruling all or any of the Exceptions taken by the Respondents and Appellant respectively, which the said Court is thereby directed (subject, as after mentioned) to re-hear; and also, without prejudice

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

to what the Court may thereafter order, as to the taking of the Account between the Parties, either in the same manner as is directed by the said Order of the 1st of August, 1800, or in any other manner; due regard being had by the Court in the making any such Order or Orders thereafter to be made to the Proceedings which had been already had in the Cause, and the practice of the Court: And it is further Ordered, that the Parties are to be at liberty to apply to the Court in such manner as is according to the practice thereof, and as they shall be advised, for the purpose of having any alteration or variation ordered to be made in the original Decree, or for the purpose of having the Accounts between them taken in any manner to be prayed upon such Application, or for having the *Master's* Report reviewed, or for further directions, or for any other purpose with respect to which they shall be advised to make application; and the said Court, having due regard to the Proceedings already had in the said Cause, and the practice of the said Court, is to make such Order or Orders thereupon, as shall to the said Court seem meet: And it is further ordered, that in case the Order or Orders which the Court shall think proper to make upon any application to the Court, under such liberty to apply as aforesaid, shall render it unnecessary, in the judgment of the Court, to re-hear the said Exceptions, or any of them, then the Court is to be at liberty, notwithstanding the direction thereinbefore contained, touching the re-hearing of the said Exceptions, to make such Order or Orders respecting the same; and the Costs thereof, and of the Proceedings which had been had relative thereto, as shall appear to the Court to be just, and according to its practice.

George Rose, Clerk of Parliament."

The Exceptions now came on to be re-heard, no re-hearing of the Cause or other Proceeding having taken place subsequently to the decision in the House of Lords. The Exceptions taken on behalf of the Plaintiffs, amounted to Ninety-one; three Exceptions were also taken by the Defendant, Mr. *Solicitor General*, Sir A. Pigott, Mr. *Serjeant Bosanquet*, and Mr. *Wyatt*, in support of the Plaintiffs Exceptions; Mr. *Hart*, Mr. *Bell*, and Mr. *Heald*, *contra*; and in support of the Exceptions taken by the Defendant. No Cases were cited on either side.

1819.
15, 18, 19
January.
EAST INDIA
COMPANY
v.
KEIGHLEY.

The VICE-CHANCELLOR:—

In this Case a Bill is filed by the *East India Company* against Mr. *Keighley*, who had been a servant of the Company, and had held a situation of Factor for the Company at *Banleah* in the *East Indies*. The Bill complains that Mr. *Keighley*, in his character of Factor, had by certain Contrivances, made an illegal profit; and it calls upon the Court to declare, that Mr. *Keighley* is to be answerable to the Company for the illegal profit so made. The first Contrivance stated, is, that Mr. *Keighley*, who, in his situation of Factor, was bound to buy Silk for the Company, to exercise, therefore, all his diligence and activity for procuring that Silk at the lowest price, did, in truth, become himself a concealed seller of Silk to the Company, by engaging two of his Servants to propose in their names, but on his account, Contracts for the sale of Silk at a particular price, which, on the part of the Company, he accepted. Another Contrivance charged in the Bill, is, that after those Contracts had expired, Mr. *Keighley* proposed to the Company to contract with them himself for the sale of Silk, at a Price stated; and, in order to induce

19th Jan. 1819.

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

the Company to accept such Proposal, he represented that other market Silk bore a certain price: the Bill alleges, that, under that representation, the Company were induced to accept the Contract so proposed by him; but that Silk did not at that time bear the market Price which he had mentioned, and that Mr. *Keighley*, therefore, by the effect of this misrepresentation, gained a large undue Profit, at the expense of the Company, which a Court of Equity ought not to permit him to keep to his own use. At the hearing of this Cause, the Lord Chancellor, Lord *Rosslyn*, considered that these Contrivances were proved, and Mr. *Keighley* having in his Answer admitted that he had made a Profit upon these Contracts, amounting nearly to 20,000*l.*; the Decree declared, that Mr. *Keighley* was to be considered a Trustee for the Company in respect to the Profit made on the two Contracts entered into with *Datterham Ghose* and *Anunderam Sircar*, his Servants, and also on his own Contract; and directed a general Account of the Dealings and Transactions between the Parties. The *East India Company* were undoubtedly at liberty to have taken, at the hearing of the Cause, a Decree that Mr. *Keighley* should pay to the Company the Profits which he admitted; but the Company not choosing to be bound by the admission of Mr. *Keighley*, and considering that in the progress of the Accounts they might be able to establish a much larger Profit, they therefore desired this Decree for a general Account. On the execution of that Decree, they proceeded in the *Master's* Office, to carry in a Charge of all the Sums which they had paid to Mr. *Keighley*, in respect of the purchase of Silks, during the time to which the Contracts applied; and then called upon Mr. *Keighley* to discharge himself, by showing that he had actually paid so much as would reduce the Sum he

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

had received to the extent of the Profit which he had admitted. In the progress of this investigation, the *Master* permitted Mr. *Keighley* to enter into evidence, for the purpose of establishing, not only that he had not made greater Profits than the Sum admitted, but that he had not made any Profits, and that he had, in truth, been a great loser by the transaction; and the *Master* considered himself at liberty to find, that, in respect of such Loss, there was no less a sum than 67,000*l.* due from the Company to Mr. *Keighley*; and the substantial question is, Whether the *Master* was justified in this course of proceeding, and in this conclusion. It is said, that although it is very true, that the *East India Company* might, if they pleased, in the *Master's* Office, have immediately charged Mr. *Keighley* with this admitted Sum, and gone no farther; yet, because they required an Account, they opened the Account altogether, and that Mr. *Keighley* was therefore at liberty to contradict his own Answer, and to prove that he had made no Profit, but had sustained a Loss, and to charge the *East India Company* with that Loss. I am not of that opinion. This Decree proceeds upon the ground, that the Agent has, by improper Contrivances, obtained an advantage over his Principal; it declares the Agent in these Transactions a Trustee for his Principal; and the Agent admitting a Profit, it directs an Account only for the purpose of enabling the Principal to establish, if he can, a greater amount of Profit than the Sum admitted. In the progress of that Account, the Admissions in Mr. *Keighley's* Answer were conclusive for the Plaintiffs, as against him and his Representatives, that he had made a Profit, at the least, to the admitted Amount; and it was against first principles to receive Evidence on the part of a

1819.

EAST INDIA
COMPANY
v.
KEIGHLEY.

Defendant, to contradict his own Answer. Upon this single view of the Case, I am of opinion, therefore, that the matter must go back to the *Master*,—and allowing all those Exceptions which apply to that part of the Report in which the *Master* finds particular Sums due from the *East India Company* to Mr. *Keighley*, (I think they begin at the fifty-fourth Exception, and pervade all the remaining part of the Exceptions,)—my further Order is, That the *Master* review his Report; the Court declaring, that the Defendants, representing Mr. *Keighley*, are not at liberty to enter into Evidence to contradict the Answer of Mr. *Keighley*: and that the Answer of Mr. *Keighley* is conclusive Evidence for the Plaintiffs, that Mr. *Keighley* did make Profits by the three several Contracts in the Decree mentioned, to the extent, at least, of the Sum admitted in his Answer. There is another point of the Case which is not involved in these Directions, I mean the point as to the Commission. With respect to this point, I am of opinion, the *Master* was not at liberty, under the Directions in the Decree, “that he should make to Mr. *Keighley* all just Allowance,” to enter into any consideration of the question of Commission, this being a substantive Claim made by the Answer, and not sustained by the Decree; the Claim, on the part of Mr. *Keighley*, is, in truth, utterly inconsistent with the Deed of Covenant which he entered into with the Company: I shall therefore declare, that the question, as to the Commission, being raised in Mr. *Keighley*’s Answer, and no Direction given with respect to it in the Decree, that the *Master* was not at liberty under the Order “to make Mr. *Keighley* just Allowances,” to enter into the consideration of that Claim; and the only addition I shall make to the Order is, that in the progress of the subsequent Account of the Defendant,

CASES IN CHANCERY.

39

the Assignees shall be at liberty to use all Admissions made on the part of the Plaintiffs on taking the prior Account.

1819.
—
EAST INDIA
COMPANY
v.
KEIGHLEY.

With respect to the Deposit, I think that it should be returned, because I cannot approve the mode in which these Exceptions have been taken, where the nature of the Case admitted of a much shorter form. I make the Order upon both Sets of Exceptions, that the Deposit shall be returned (z).

(z) Vide *Wall v. Bushby*, 1 Bro. C. C. 484.

SPURRIER v. BENNETT.

IN this Case, a Notice of Motion was given, that the Injunction granted in this Cause might be dissolved, and the Cause dismissed, for want of Prosecution.

21 January.
On Replication, after Notice of Motion to dismiss, the Motion not sustainable; but Defendant is entitled to Costs,

Subsequent to the Notice of Motion, a Replication was filed.

Mr. *Barber*, for the Motion, observed, that as a Replication was filed, he could not insist upon the Motion; but as the Replication was filed subsequent to the Notice of Motion, he was entitled to his Costs.

Mr. *Ellison*, *contra*.—

The VICE-CHANCELLOR:—

As the Replication was filed before the Motion made, it cannot be sustained; but as the filing of the Replication was subsequent to the Notice of Motion, the Defendant must have his Costs.

1819.

BOYS et UX. t. FORD and Another.

21st Jan.

On the motion of the Defendant before Answer, a reference was made to the Master to ascertain what was due to the Plaintiff for Principal, Interest and Costs, in respect of the Legacy claimed by the Bill; the same to be paid within a given period; and if not paid, the Plaintiff's Costs of the Application, and of the Master's Report, to be taxed and paid by the Defendant, and the Plaintiff to be at liberty to proceed in the Cause.

MR. Phillimore moved, before Answer, on behalf of the Defendant, that it might be referred to a Master to report what was due to the Plaintiffs for the remainder of the Legacy of 500*l.* mentioned in the Pleadings, and to tax the Plaintiffs their Costs of the Suit. In support of the Motion, he stated the Case of *Phillpot v. Rosher*, 25th June 1817, which was a Bill filed by the Plaintiff on behalf of himself and other Creditors against the Defendant, as the personal Representative of his Father and others, praying the usual Accounts, and on the Motion of Mr. Maddock, before Answer, which was opposed by Mr. Phillimore, the late Vice-Chancellor (Sir Thomas Plumer) made the following Order:—"Whereupon and upon hearing Mr. Phillimore of Counsel for the Plaintiff, the said Affidavit and an Affidavit of the Plaintiff read, and the Defendant *Jeremiah Rosher*, by his Counsel, undertaking to pay into the Bank, with the privity of the Accountant General of this Court, to the credit of this Cause, the sum of 211*l.* 12*s.* 4*d.* the Amount of the Bill of Costs delivered by the Plaintiff, and claimed by his Bill in this Cause, to be due from the Defendant *Jeremiah Rosher*; this Court doth order that the said Defendant *Jeremiah Rosher* do pay the same accordingly, on or before the first Seal after this present *Trinity Term*: And it is ordered, that it be referred to Mr. Jekyll, one of the Masters of this Court, to tax the said Bill of Costs; and in order thereto all parties are to be

examined upon Interrogatories, and are to produce upon Oath all Books, Papers, and Writings and Vouchers in their custody or power relating thereto, or any of the Items or Charges, therein as the said Master shall direct: And it is ordered, that what shall be taxed for such Costs be paid to the Plaintiff *Thomas Griffin Phillpotts*, out of the said sum of 211 *l.* 12 *s.* 4 *d.*.. and thereupon it is ordered that the Plaintiff do deliver to the said Defendant *Jeremiah Rosher* upon Oath, all Books, Papers and Writings which he has in his custody or power belonging to the said Defendants: And it is ordered, that the residue of the 211 *l.* 12 *s.* 4 *d.* (if any) be paid to the said Defendant *Jeremiah Rosher*: And it is Ordered, that the said *Jeremiah Rosher* do pay unto the Plaintiff and the others, Defendants, their Costs of this Suit, to be taxed by the said Master, not including the Costs of this Application; and thereupon it is ordered that the Plaintiff's Bill stand dismissed out of this Court."—He also mentioned the Case of *Lee v. Biddlecombe*, 10th December 1817, which was a Bill filed by the holder of a Bill of Exchange for 300 *l.*, accepted by the Defendant *Biddlecombe*, on behalf of himself and other holders of Bills accepted under like circumstances, claiming an equitable lien on an Indenture of Settlement executed on the marriage of the Defendant *Biddlecombe*, and upon his Interest under it, and that the Defendant *Bolton*, in whose possession the Deed was, might be declared a Trustee for the Plaintiff and the other Bill Creditors, and might be restrained from parting with it. An Injunction was granted. Mr. *Hart* and Mr. *Seton* moved, That it might be referred to the Master to inquire what was due to the Plaintiff for Principal and Interest on the Bill of Exchange, and to tax all Parties their Costs.

1819.

Boys et Ux.
v.
Ford
and another.

1819.

Boys et Ux.
v.
Ford
and another.

And that on payment of what should appear due for Principal, Interest and Costs, the Bill might be dismissed, and the Injunction dissolved.—Mr. G. Wilson, for the Plaintiff, opposed the Motion; but the Lord Chancellor made the following Order:—“Ordered, that on payment by Defendant B. to Plaintiff, of the Sum of 316*l.*, admitted to be due to him for Principal and Interest, in respect of the Bill of Exchange for 300*l.*, together with 22*l.* 1*s.* 8*d.* for the Plaintiff's Costs at Law, the Injunction to restrain Defendant *Biddlecombe* from taking the Indenture of Settlement, dated 31st May 1798, out of the hands or custody of Defendant *Bolton*, and to restrain Defendant *Bolton* from parting therewith, and also to restrain the Defendants, the Governor and others of the Bank, from permitting any transfer of the 13,657*l.* 13*s.* 8*d.* three-per-cent. Consols, standing in the names of other Defendants, and from paying Dividends to any person until Defendant *Biddlecombe* should answer the Bill, or the Court should make further Order, should be dissolved. And that it should be referred to Master—to tax the Costs of Plaintiff and other Defendants, and that such Costs of the Plaintiff and other Defendants should be paid by Defendant *Biddlecombe*; and in case there should be any delay in paying the said Costs, when taxed by Defendant *Biddlecombe*, Plaintiffs and other Defendants were to be at liberty to apply for reviving Injunction or otherwise, as they should be advised.”

Mr. Reupell, *contra* :—

The Defendant does not undertake to pay the Money and Costs when ascertained, nor does he propose to pay the Interest due on the Legacy.

The *Vice-Chancellor* stated, that, in order to save unnecessary Expense, the Court would at any time stop a Suit, when a Defendant submitted to satisfy the Plaintiff's just demands, and made an Order, referring it to the *Master* to compute Interest upon the Legacy, after the rate of 5 per cent. from the end of one year after the Testator's Death, and to tax the Plaintiff's Costs in this Suit; and that the Defendants should, within eight weeks after the *Master* should have made his Report in pursuance of this Order, pay to the Plaintiff what the *Master* should certify to be due to him for Principal and Interest in respect of his Legacy, together with the Plaintiff's said Costs; and thereupon it was ordered that the Plaintiff's Bill should be dismissed: But in default, &c. it was ordered, that it should be referred to the *Master* to tax the Plaintiff his Costs of this Application, and of the Proceedings before the *Master* in pursuance of this Order, and of the *Master's* Report to be made in pursuance thereof; and that the Defendant should pay such Costs, when taxed, to the Plaintiff. And in that case it was ordered, that the Plaintiff be at liberty to proceed with the Cause.

1819.

Boys et Ux.

v.

FORD

and another.

1819.

BENTHAM (since deceased) and Another v.
WILTSHIRE.

27th January.

Executors have only power to sell real Estate where expressly given, or necessarily to be implied from the Produce being to pass through their hands in the execution of their Office.

THIS was a Bill for the specific performance of an Agreement to sell a certain Messuage, and several pieces of Land belonging to the same.

On a reference to the *Master*, he Reported a good Title could be made, and the Report was absolutely confirmed. An Order was subsequently made, on the 3d March 1817, referring it to the *Master* (amongst other things) to settle a proper conveyance of the Estate and Premises to the Defendant, or to whom he should appoint; and by the *Master's* Report, 22d April 1818, he reported, that a Draft of the Conveyance had been laid before him, and he had settled and approved of the same, and had, amongst other persons, made *Joseph Bassan*, (the only surviving Son and Heir at Law of *Abraham Bassan* deceased, the Testator in the Conveyance mentioned) a Party, as he was of opinion he was a necessary Party thereto.

To this Report, Exceptions were taken, on the ground that *Joseph Bassan* was not a necessary Party to the Conveyance.

Abraham Bassan, the Testator, by his Will, 21st December 1797, bequeathed to *Hannah Barrett* the Estate in question, for her Life, provided she did not marry, and directed that "after her decease the Estate should be sold," (not saying by whom) "to the highest bidder,

by public Auction, and the Money or Monies arising from such sale thereof, to be disposed of in manner and form following," amongst certain illegitimate Children in the Will named, first paying unto *George Barrett* a Legacy of 5*l.*; and he appointed *Bryan Bentham* and *Hannah Barrett* his Executors.

1819.
BENTHAM
and another
v.
WILTSHIRE.

The Testator afterwards died, and his Will was proved by his Executors. The Testator, at his death, left a Widow and three Sons, viz. *Joseph Bassan*, *Abraham Bassan*, and *Samuel Bassan*, who, as his lawful Issue, were his Co-heirs at Law, according to the custom and mode of Descent of Gavelkind Lands, which the Premises and Lands in question were.

Elizabeth Bassan, the Testator's Widow, died sometime after the Testator's death, as did also his Sons *Abraham Bassan* and *Samuel Bassan*, without Issue and intestate; whereby the legal Estate in Fee Simple in remainder immediately expectant upon the decease of *Hannah Barrett*, the Tenant for Life under the Testator's Will, became vested in *Joseph Bassan*, as the only surviving lawful Issue and Heir at Law of the Testator.

The Sale took place during the life of the Tenant for Life, with the concurrence of both the Executors; but *Bentham*, one of the Executors, died after the institution of the Suit. The Persons amongst whom the Purchase Money of the Estates was to be divided, were all of age, and ready to join in the Conveyance.

Mr. Bell, *Mr. Wyatt*, and *Mr. Preston*, in support of the Exceptions:—

This is merely a question of Conveyance, and whether

1819.

BENTHAM
and another
v.
WILTSHIRE.

the Heir at Law is a necessary Party to the Conveyance. No Persons are named who are to sell the Estate, and those Persons therefore must sell who are to apply the Produce of the Sale, that is, the Executors of the Testator. In *Sheppard's Touchstone* (a), an excellent Work (b), it is laid down, "If one deviseth by his Will that his Land shall be sold to pay his Debts, and say not by whom, in this case it shall be sold by his Executors; and if one devise all his Land except one Acre, which he doth appoint to pay his Debts, by this devise his Executors, or the Survivor of them, may sell it: but if one say by his Will, that *I. S.* shall have *tam gubernationem puerorum meorum, quam* the disposing, letting and setting of my Lands, by this devise *I. S.* hath a power given to him to sell the Land." In *Perkins* (c), it is said, "And if a Man willeth that his Lands shall be sold for the payment of his Debts, and doth not express by whom the Sale shall be, it shall be sold by his Executors, for the payment of his Debts; and the payment of his Debts doth belong unto the Executors: but if a Man willeth that his Land shall be sold, and doth not say by whom, nor for what, it seemeth to be void; *tamen quære* the opinion of other Men." There is a Case in *Dyer* (d), where a Man devised all his Manors, &c. to his Sister, excepting out of this general Bequest his Manor of *R.*, which he appointed to pay his Debts, and appointed two Executors by name, and died; one of the Executors died; and then the other sold the Land, and the Sale was held good.

(a) Hilliard's Ed. p. 43.

(b) On Mr. Preston's praising this Work, the *Vice-Chancellor* said, "You say right: there is as much sound infor-

mation in that Work, as in any known to the Profession."

(c) Sect. 547.

(d) 371. (b.)

In that Case, as in this, one of the Executors died, but the Survivor, it was held, might sell; so, also, there are the Cases of *Barrington v. Attorney General and others* (e), and *Blatch v. Wilder* (f). All these Authorities prove, that where a Sale is directed for payment of Debts or Legacies, and no Person is named to sell, the Executors may sell (g); and thus the difficulty is obviated, of getting a reluctant Heir to join in the Sale: the Testator having disinherited his Heir, could never mean him to act as Trustee.

1819.
BENTHAM
and another
v.
WILTHIER.

If an objection is made, that the Will only directed a Sale after the death of the Tenant for Life, who is still living, our Answer to that is, that it was an objection to the Title; but on a reference to the Master, he reported a good Title could be made, and that Report has been confirmed, so that such Objection is too late; and in an *Anonymous Case* in *Leonard* (h), it appears these three Propositions were determined: 1st, That where a general Authority is given to sell, for the payment of Debts and Legacies, and no Person named to sell, the Executors may sell; 2dly, That if there be several Executors, and one dies, the Survivors may sell; and, 3dly, That though the Estate was directed to be sold after the death of the Tenant for Life, they may sell during the life of the Tenant for Life, for if all the Executors were to die in the life-time of the Tenant for Life, the Estate could not be sold. *Useful v.*

(e) Hardres, 419.

and Grounds and Rudiments,
&c. p. 311.

(f) 1 Atk. 420.

(h) 2 Leon. 220.

(g) In addition to the Authorities cited, see Els. Obs. 93,

1819.

BENTHAM
and another
v.
WILTSHIRE.

Uvedale (i), Pitt v. Pelham (k). These Cases are referred to in *Powell on Devises*.

Mr. *Horne*, and Mr. *Sugden*, *contra*:—

We insist that the Heir at Law is a necessary Party to this Conveyance. No power is expressly given to any Persons by name to sell, nor is there any direction to the Executors to pay Debts or Legacies:—If there is no power of Sale given to any one by name, the Heir at Law becomes a Trustee for that purpose, and he must sell (*l*); and, consequently, it is necessary that he must join in the Conveyance:—If the Lands could not be sold, unless by the Executors, there would be more force in the argument; but here it is not necessary they should sell,—they are not the only persons who can sell,—as the Heir at Law may, as a Trustee, be compelled to sell. If the power of Sale was to be executed by the Executors, it cannot now be executed, because one is dead.

No Sale was authorized during the life of the Tenant for Life, and we may suppose the Testator had good reason for deferring the Sale until after her death, supposing, probably, the Estate would then be more valuable and productive. The Case of *Pitt v. Pelham (m)*, is an Authority, not against, but in favour of the Exceptions; for though it was reversed in the *House of Lords* as to some points, it was not as to all the points there determined.

(i) 3 Atk. 119.

(k) 1 Ch. Cas. 176. 1 Leo.

304.

(l) See Co. Litt. 113 a. note, 2.

(m) 1 Ch. Cas. 176. S. C. 2

Freem. 136. 1 Ch. Rep. 283.

T. Jones, 25. 1 Lev. 304.

The VICE-CHANCELLOR :—

To enable Executors to sell, the power must either be expressly given to them, or necessarily to be implied, from the Produce being to pass through their hands in the execution of their Office, as in payment of Debts and Legacies; but here, the Executors have nothing to do with the produce of the Sale, nor any power of distribution with respect to it. It is a further circumstance, that the Sale is directed to be made after the death of the Tenant for Life, who was one of the Executors; there is here, therefore, no power of Sale in the Executors.

1819.
BENTHAM
and another
v.
WILTSHIRE.

Exceptions over-ruled (o).

(o) Some of the points in in note 2, to Co. Litt. page this Case are ably considered 113a.

WILD v. HOBSON.

THE Vice-Chancellor directed the Bill in this Cause should be dismissed, with Costs.

29th January.
On a Decree
for dismissal of
Bill with Costs,
the same was pre-
faced with a
direction for the
payment of Costs
on some Motions
in the Cause.

Mr. Bell said, there had been some Motions made in the Cause, the Costs of which could not be obtained, unless the Decree of Dismissal was prefaced with a direction for the payment of those Costs; and mentioned *Daubigny v. Cockburne*, before the late Master of the Rolls (p), where that course had been pursued.

The VICE-CHANCELLOR :—

Let this Decree be prefaced, as in that Case.

(p) Sir William Grant.

1819.

Same day.

HOLKIRK and others v. HOLKIRK and another.

Motion by some of several Plaintiffs to have Bill dismissed against them, with Costs, granted on terms.

THIS was a Motion, by Mr. *Bell*, on behalf of several of the Plaintiffs, that the Bill, as far as they were concerned, might be dismissed with Costs.

Mr. *Collinson*, *contra*, objected, that the Plaintiffs who sought to have the Bill dismissed were, with the other Plaintiffs, residuary Legatees, and necessary Parties to the Bill; and that if the Bill is dismissed against these Plaintiffs, they must, at considerable expense, be made Defendants, with the additional inconvenience, that all but one of these Plaintiffs are out of the jurisdiction, being resident in *France*; a circumstance that would occasion great delay in the Suit. He cited *Tetterton v. Osborne* (q). It must be proved they are out of the jurisdiction, which it may be difficult to do.

Mr. *Bell*, in reply:—

The object of this Motion is not delay. The Bill contains imputations on one of the Defendants, the Mother of these Plaintiffs, and they are unwilling to appear as Plaintiffs, countenancing such imputations on their Parent.

The VICE-CHANCELLOR:—

Plaintiffs cannot be permitted to withdraw themselves from that character, if, by so doing, the remaining

Plaintiffs in the Suit are injured. If the Defendant, the Mother, will undertake not to object, at the hearing of the Cause, that it is not proved that these Persons are out of the jurisdiction of the Court, the Plaintiffs, on paying their Costs of the Suit and of this Motion, and of the amendment of the Bill, may take the Order. That Plaintiff who is here, must also undertake to put in his Answer as Defendant, when the Bill is amended, within a fortnight after the filing of the amended Bill. Granting the Motion on these terms, will not injure the other Plaintiffs.

1819.

HOLKIRK
and others
v.

HOLKIRK
and another.

Mr. Collinson:—There are two Defendants: the Mother of these Plaintiffs, who is Executrix, and another Person, who is Executor with her. Her consent, alone, not to object at the hearing, will not be sufficient.

The VICE-CHANCELLOR:—

Her consent *out* of Court would bind the other Defendant, the Executor, and so it will *in* Court.

Motion granted.

RHODE v. SPEAR.

MR. Phillimore moved, on behalf of the Defendant, to dismiss the Bill, with Costs, for want of Prosecution.

Same day.

Mr. Roots, *contra*, objected, that the Defendant having, since the commencement of the Suit, become a

1819.

RHODE

v.

SPEAR.

29th January.

Bankrupt, could not now make this Motion; or, if he could, that the Plaintiff would undertake to speed the Cause.

Mr. *Phillimore* in reply, cited *Monteith v. Taylor* (r) as an Authority for the Motion; and said the Plaintiff had already once undertaken to speed the Cause.

The VICE-CHANCELLOR:—

Take the usual Order made on a second undertaking to speed the Cause.

(r) 9 Ves. 615.

GIBBONS v. HOWELL.

Same day.

MR. WEST moved that his Client might be permitted to open the Biddings in this Case. He said another Person had before moved to open the Biddings, but he had not drawn up the Order, or paid his Deposit.

The VICE-CHANCELLOR:—

Although the former Order is not drawn up, nor acted upon, the Court cannot treat it as a nullity, without notice to the Persons who obtained it. Let your Motion stand over, and give notice to the Party who moved before to open the Biddings.

WICKHAM v. EVERED.

THIS was a Bill for the specific performance of an Agreement to purchase an Estate; and Mr. *Spence* moved that the Defendant might pay his Purchase Money into Court, the Defendant being in possession, and having exercised Acts of Ownership upon the Estate.

Same day.

Mr. *Simpkinson* opposed the Motion, stating that, by the Purchase Agreement, the Purchase Money was not to be paid until a good Title was made, and that the Defendant took Possession, under an assurance that the Title was good; but no good Title appeared on the Abstract, and the Defendant had insisted on the misrepresentation and want of Title, by his Answer.

The VICE-CHANCELLOR:—

The Defendant cannot keep Possession of the Estate and of his Purchase Money too. If he elect to retain the Possession, let the Purchase Money be paid in within a Month, without prejudice to any question in the Cause.

1819.

3d Feb.

MORGAN v. SHAW.

On a Demurrer by a Witness to an Interrogatory, the same was overruled, it being too general; but leave was given to put in a written Demurrer on a re-examination.

IN this Suit, the following Interrogatory was put on the cross-examination of a Witness :—

1st Interrogatory:—"Did you, in the Month of February last, or at some other time, and where, inform the Plaintiffs, or some, and what Person, that you could give material Evidence in this Cause, and such as would cause the same to be decided in favour of the Plaintiffs? or did you, or not, make some Declaration, and to whom, of or to such or the like purport or effect; and what was the purport of the Evidence which you so spoke of or alluded to? Do you know, or are you acquainted with any Matter or Thing that may tend to the benefit or advantage of the Plaintiffs in this Cause? If yea, set forth the same as fully as if you had been thereunto particularly interrogated."

To this Interrogatory the Defendant demurred, as follows:

"To the 1st Interrogatory this Deponent says, that he demurs thereto; and for cause of Demurrer says, that the Defendant in this Cause is now a Client of this Deponent, who does not practise as a Solicitor in this honourable Court, and was originally concerned for the said Defendant as his Solicitor in this Cause, and does expect to be again concerned for him as his Solicitor; and says, that by answering the said Interrogatory, he, this Deponent, would (as he considers) be divulging the secrets of his Client; and, therefore, he,

this Deponent, submits it to the Judgment of this honourable Court, whether he shall make any Answer thereto."

1819.

MORGAN

v.

SHAW.

This Demurrer was set down, as other Demurrers are (s), and now came on to be heard.

Mr. *Heald*, in support of the Demurrer :—

The Demurrer in this Case, was put in upon the cross-examination of the Witness.—The Examiner has looked into the Precedents, and he finds no instance of a general Demurrer on the cross-examination of a Witness. Here the Witness is asked, "Do you know, or are you acquainted with any Matter or Thing that may tend to the benefit or advantage of the Plaintiff in this Cause?" Such an Interrogatory is irregular, on a cross-examination.

It is difficult for a Witness, called upon suddenly, to put in a proper Demurrer to an objectionable Interrogatory: the Demurrer is prepared by the Examiner: this Demurrer was not, perhaps, so correct and formal as it might have been; but the Court will not be strict as to the form of the Demurrer upon such occasions. The Witness objects to the Interrogatory, because it will be divulging the Secrets of his Client; but the Demurrer ought certainly to have stated that such Secrets were communicated to him by his Client, for if he came to his knowledge, in his character of

(s) In the Case of *Parkhurst v. Lowles*, ante, 3 vol. p. 123 Note (b), it was thought these Demurrers ought not to be set down amongst other Demurrers; but on an Appeal to the Lord Chancellor, he held, that such Demurrers ought to be set down, to be argued like other Demurrers.

1819.

MORGAN

v.

SHAW.

Attorney, but not by the communication of his Client, he is bound to reveal such Secrets (t).

There was a Case of this kind, *Packhurst v. Lowten* (u), determined by your Honour, which was afterwards, on appeal, before the *Lord Chancellor*, and his Lordship declared that the reasons stated by *Godfrey* the Witness, as a ground of Demurrer, were not sufficient to sustain the Demurrer, and ordered it to be overruled; and the Commission having been returned, that a new Commission should issue; but the overruling of the Demurrer was to be without prejudice to *Godfrey's* objecting by Demurrer in writing, upon the execution of the Commission to the Interrogatories, or any of them, or any part or parts, as he might be advised, upon such grounds as he should state in such Objections or Demurrer. If the present Demurrer is overruled, I trust the Order will be made, as in the Case before the *Lord Chancellor*.

(t) "Barristers and Attornies, to whom facts are stated professionally during a Cause, or in contemplation of it, are neither obliged or permitted, though they should so far forget their duty as to be willing to do so, to disclose the Facts so divulged during the pendency of that Cause, or at any future time. But where the Attorney himself is, as it were, a Party to the Original Transaction, as if he attest the execution of a fraudulent Deed,

was present when his Client was sworn to an Answer in Chancery, or employed as the Steward or Agent, and does not gain his knowledge of it merely by the relation of his Client, the Rule does not apply; for, in these Cases, there was no professional confidence, and he stands in the same situation as every other Person." See *Peake on Evidence*, pp. 194-5, 6 Edw. IV. and the Cases there cited.

(u) *Ante*, 3 vol. p. 121.

Mr. *Roupell*, and Mr. *Blake*, in support of the Interrogatory, mentioned *Bowman v. Rodwell* (x), and contended the Demurrer ought to be overruled, as not sufficiently precise; an Attorney being bound to communicate Facts, though they affect his Client, if such Facts are communicated, not by his Client, but *aliunde*.

1819.
MORGAN
v.
SHAW.

The VICE-CHANCELLOR:—

When the Case of *Parkhurst v. Lowten* was before me, I was not aware that a Demurrer of this nature is, in effect, an Answer put in upon Oath, by which the Party swears that he cannot speak to the question stated, without a breach of the privilege of his Client; a further Affidavit is therefore unnecessary; for if his situation be not truly such as he represents it, he is indictable for perjury. If, upon an Examination at Law, an Attorney swears that a question, put to him as a Witness, cannot be answered, without the disclosure of Secrets professionally communicated to him by his Client, his Oath, in this respect, is conclusive; unless it appears, from the nature of the question, that the principle of protection does not extend it, as whether he was the attesting Witness to a Deed. The same rule must apply upon his examination in Equity; and his Oath to the same effect, in what we call his Demurrer, must be equally conclusive.

The statement which he makes upon this Demurrer would not, however, protect him from answering at Law, and cannot protect him here.

He says, that he cannot answer, without divulging

(x) *Ante*, 1 Vol. p. 266.

1819.

MORGAN

v.

SHAW.

the Secrets of his Client ; but a Solicitor must, like any other Witness, divulge all Secrets of his Client which he did not come to the knowledge of in his relation of Solicitor to his Client. Let the Order be similar to that made by the *Lord Chancellor* in *Packhurst v. Lowten*; the only difference being, that no Commission is necessary in this Case, as the Witness is to be examined in Town.

Original Bill,

Between JOHN SACKETT - - - Plaintiff,
and
STEPHEN BASSETT and JOHN }
BROOMAN - - - } Defendants.

Supplemental Bill,

Between JOHN SACKETT - - - Plaintiff,
and
AMBROSE COLLARD and LATHAM }
OSBORNE - - - } Defendants.

9th February.

*Mortgagor
agrees to give a
second Mortgage
for what is due
for Principal and
Interest on the
first Mortgage,*

BY Indenture 13th September 1793, Bassett mortgaged certain Premises to one *Brooman*, to secure 730*l.*, and Interest at five per cent, payable half-yearly. Subsequently to the Mortgage, various dealings and transactions took place between the Parties, and on the 13th

and also for Interest on the Interest due on the first Mortgage. Query, if the second Mortgage void as founded in usury?

March 1804, another Mortgage was taken by *Bassett* from *Brooman*, for 1,200 *l.*, which Sum was composed of the Principal and Interest due on the first Mortgage, and *Interest upon the Interest due*.

1819.

J. SACKETT
v.

S. BASSETT
and another.

And
J. SACKETT
v.

AMB. COLLARD
and another.

The Mortgage of the 13th *March 1804*, was, on the 30th *June 1810*, assigned by *Brooman* to the Plaintiff *Sackett*, and he filed his Original Bill against *Bassett* and *Brooman*, to foreclose.

Bassett, by his Answer to the Original Bill, insisted that the second Mortgage was founded on Usury, and was invalid; the consideration, in part, being formed of Compound Interest; and *Brooman*, by his Answer, admitted that Compound Interest constituted part of the consideration of the second Mortgage.

The Cause was heard before the late *Master of the Rolls* (o), and by his Decree, 14th *July 1814*, it was referred to the *Master* to take an account of what was due from the Defendant *Bassett* to the Defendant *Brooman* on the security of the Mortgages of the 13th *September 1793*, and the 13th *March 1804*, on the 7th *January 1811*, when *Bassett* admitted notice of the Assignment to the Plaintiff of the 30th *June 1810*, and also an Account of what was due to the Plaintiff for Principal and Interest by virtue of such Assignment.

After this Decree *Bassett* became a Bankrupt, and a Supplemental Bill was filed against *Collard* and *Osborne*, his Assignees; and by the Decree on that Bill, 12th *December 1817*, the Decree in the Original

1819.

Cause was directed to be carried on between the Parties to the Supplemental Suit.

J. SACKETT

v.

S. BASSETT
and another.

And,

J. SACKETT

v.

AMB. COLLARD
and another.

The *Master*, by his Report, 2d *June* 1818, after noticing, amongst other things, a state of Facts laid before him on behalf of the Defendant *Brooman*, and an Affidavit made by him; and also a state of Facts by the Defendant *Bassett*, verified by his Affidavit, concluded his Report as follows, "Now, upon consideration of the several matters hereinbefore mentioned, and it appearing to me, that the sum of 1,200*l.*, for the securing whereof with Interest the second Mortgage, hereinbefore mentioned, was executed, was made up in part of Interest calculated quarterly on the sum of 730*l.*, for the securing whereof, with Interest, the first Mortgage, hereinbefore mentioned, was executed, and by calculating Interest upon such Interest, for the purpose, as I conceive, of acquiring, and thereby actually taking, as far as the same is secured by the said second Mortgage, a greater rate of Interest than five per cent. per annum upon the said sum of 730*l.* secured by the said first Mortgage; I am of opinion that the second Mortgage, being the said Mortgage of the 13th day of *March* 1804, is so far founded in usury, and is therefore void, and consequently that nothing was due from the said *Stephen Bassett* to the said *John Brooman* thereon on the 7th day of *January* 1811; and I do not find that any thing was due from the Defendant *Stephen Bassett* to the Defendant *John Brooman* on the security of the said Mortgage of the 13th day of *September* 1793, on the 7th day of *January* 1811, the same having, as I conceive, been satisfied by the said Mortgage of the said 13th day of *March* 1804; nor do I, for the reasons aforesaid, find that any

thing is due to the Plaintiff for Principal and Interest by virtue of the Assignment of the 30th day of June 1810."

To this Report the Plaintiff, and the Defendant *Brooman*, excepted.

1st Exception:—"For that the said *Master* hath, in and by his said Report, certified, That it appearing to him that the Sum of 1,200 *l.*, for security whereof, with Interest, the second Mortgage thereinbefore mentioned was executed, was made up, as in the said Report particularly stated and set forth, he was of opinion, that the said second Mortgage, being the Mortgage of the 13th day of *March* 1804, is, so far as therein mentioned, founded on Usury, and is therefore void: whereas the said *Master* ought not so to have certified, inasmuch as it is not by the said Decree referred to the said *Master* to enquire into the consideration of the Mortgages in the Pleadings in this Cause mentioned, or either of them; but only to take an Account of what was due from the said Defendant *Stephen Bassett*, to the said Defendant *John Brooman*, and also to the said Plaintiff, by virtue of the Assignment made thereof to him, as in the said Decree mentioned, at the respective dates and times therein particularly mentioned.

2d Exception.—For that the said *Master* hath, in and by his said Report, certified, That he did not find that any thing was due from the said Defendant *Stephen Bassett*, to the said Defendant *John Brooman*, on the security of the said Mortgage of the 13th day of *September* 1793, on the 7th day of *January* 1811, the same having, as the said *Master* conceived, been satisfied by

1819.

J. SACKETT

v.

S. BASSETT
and another.

And,

J. SACKETT

v.

AMB. COLLARD
and another.

1819.

J. SACKETT

v.

S. BASSETT

and another.

And,

J. SACKETT

v.

AMB. COLLARD
and another.

the said Mortgage of the 13th day of *March* 1804; and that, for the reasons aforesaid, he did not find that any thing was due to the Plaintiff for Principal and Interest, by virtue of the Assignment of the 13th day of *June* 1810: whereas the said *Master* ought not so to have certified, but he ought, in and by his said Report, to have certified, that there was due from the said Defendant *Stephen Bassett*, to the said Defendant *John Brooman*, on the security of the said Mortgages of the 13th day of *September* 1793, and the 13th day of *March* 1804, on the 30th day of *June* 1810, the day of the Date of the said Assignment made to the Plaintiff, the Principal Sum of 1,200 *l.*, together with such further Sum for Interest, if any, as upon the final settlement of Accounts, between the said Defendant *John Brooman*, and the said Defendant *Stephen Bassett*, should appear to have remained due from the said *Stephen Bassett* to the said *John Brooman*, on that day;—and further, that the whole of the said Principal Sum of 1,200 *l.* remained due, on the security of the said Mortgages, to the said Plaintiff, by virtue of the said Assignment made to him thereof as aforesaid, together with Interest for the same, from the said 30th day of *June* 1810, the date of the said Assignment, after deducting from such Interest three several Sums of 30 *l.*, making, together, the said Sum of 90 *l.*, admitted by the said Plaintiff to have been received from the said Defendant *Stephen Bassett* on account of such Interest. In all which particulars, &c.

These Exceptions came on now to be argued.

Mr. *Horne*, and Mr. *Roupell*, for the Plaintiff *Sackett*,
in support of the 1st Exception:—

Mr. *Wilson*, for the Defendant *Brooman*, in the same interest :—

With respect to the first Exception, we contend, that as *Bussett*, by his Answer, stated the Objections to the second Mortgage, and his Answer was replied to, and no Evidence was adduced in support of those Objections, and the usual Decree on Bills of Foreclosure, was made, it was not competent to the *Master* to consider whether the second Mortgage was usurious ; but only to ascertain the amount of the Principal and Interest due upon the second Mortgage. The Court would not have made such a Decree, if the question as to Usury was to have been a subject of inquiry before the *Master* ; it would have made more special directions.

1819.
J. SACKETT
v.
S. BASSETT
and another.
And,
J. SACKETT
v.
AMB. COLLARD
and another.

Mr. *Hart*, and Mr. *Wingfield*, *contra* :—

The Decree is according to the usual form in these Cases ; and when the *Master* is directed to ascertain what is due, he is at liberty to consider the validity of the Deed under which a Claim is made, for if the Deed be void, nothing is due.

Mr. *Horne*, Mr. *Roupell*, and Mr. *Wilson*, in support of the second Exception :—

Supposing the *Master* was right, and that it was competent to him to consider the validity of the second Mortgage, he is wrong in supposing it was an usurious transaction. The first Mortgage is admitted to be free of objection, and when the second Mortgage was made, the Mortgagee agreed that it should be given for the Principal and Interest due upon the first Mortgage,

1819.

J. SACKETT

v.

S. BASSETT
and another.

And,

J. SACKETT

v.

AMB. COLLARD
and another.

together with Interest upon the Interest which had become due. That was legal.—Parties may so agree. As the Interest became due, it constituted a Debt recoverable at Law. It is not pretended that there was any fraud or duress on the part of the Mortgagee: it is not like *Bosanquet v. Dashwood* (y), or the Cases there cited (z). But supposing the *Master* was right, in reporting

(y) *Forr.* 38. S. C. MS. which agrees with the printed Report.

(z) There are several Cases on the subject of Compound Interest, which it may be useful to advert to. In *Howard v. Harris*, 1 Vern. 190, the *Lord-Keeper North* was of opinion, that as to so much Interest as was reserved in the body of the Deed, (a Mortgage Deed,) that should be reckoned Principal, for it being ascertained by the Deed, an Action of Debt would lie for it; and therefore it was reasonable that there should be Damages given for the non-payment of the Money. And upon its being urged, that this had never been practised,—and that there was not any such precedent in the Court,—and that if this were to be established for a rule, every Mortgagee would reserve all his Interest, half-yearly, from time to time, as

long as the Money should be continued out upon Usury; which would be to change the Law and Practice of the Court. The *Lord-Keeper* said, he was clear in that distinction between Debt and Damages, and he saw no inconvenience that would ensue; it would serve only to quicken men to pay their just Debts; and accordingly decreed, that after a deduction of the yearly Rents of the mortgaged Premises, out of the 60*l.* a year payable for the Interest, the Defendant should be allowed Interest for the residue of the said 60*l.* a year, for which the Defendant might have sued at Law, and have recovered Damages. It is singular that so equitable a Decision should not have been followed. It consulted the interest of all Parties: of the Mortgagor, by preventing proceedings against him, when an arrear of Interest became due; and the Mortgagee, by giving

the second Mortgage to be usurious, and the Deed void, the first Mortgage will remain good, and the

him that advantage which he might have made of his Interest Money, if it had been duly paid. In subsequent decisions, however, a Covenant is a Mortgage Deed, that if the Interest is not paid punctually at the day, it should from that time, and so from time to time, be turned into Principal, and bear Interest, cannot, it has been held, be sustained, it being considered as *unjust and oppressive*. Sir *Thomas Moor's* Case, mentioned by Lord *Talbot*, in *Bosanquet v. Dashwood*, Forr. 40. but Lord *Eldon* has observed, "There is nothing unfair, or, perhaps, illegal, in taking a Covenant originally, that if Interest is not paid at the end of a year, it shall be converted into Principal; but the Court will not permit that, as *tending to Usury*, though not Usury." *Chambers v. Goldwin*, 9 Ves. 271.

Lord *Thurlow* says, "Interest upon Interest is allowed in other cases, where there are regular Accounts settled from time to time: that is admitted in all Cases but that of a *Mortgage*, and that Exception

VOL. IV.

only stands on authority. I see no reason why Interest on Interest should not be allowed in that Case, but that is inconsistent with the Rule of Jurisdiction; but in Merchants' Accounts it is always admitted, on the ground of an original Contract, and the settling Accounts in that way is Evidence of an original Contract." *Ex parte Champion*, 3 Bro. C. C. 440. In *Brown v. Barkham*, 1 P. Wms. 652, where there was a stated Account between the Mortgagor and Mortgagee, Lord *Parker* says, "Suppose the Mortgagor signs an Account, whereby he owns so much Money due for Interest, I question whether this will make the Interest, Principal; because, of itself, it does not show any Agreement or intent to alter the Interest or the nature of that part of the debt, or turn it into Principal; neither does it appear to have been ever so determined. I conceive, to make Interest on a Mortgage, Principal, it is requisite there should be a Writing, signed by the Parties, forasmuch as the Estate in the Land is to be charged therewith."

F

1819.

J. SACKETT

v.

S. BASSETT
and another.

And,

J. SACKETT

v.

AMB. COLLARE
and another.

1819.

J. SACKETT

v.

S. BASSETT
and another.

And,

J. SACKETT

v.

AMB. COLLARD
and another.

Plaintiff is entitled to an account of what was due upon that Mortgage (b): it was not cancelled (c).

Mr. Hart, and Mr. Wingfield, *contra*, were stopped by

The VICE-CHANCELLOR:—

Whether the second Deed is or not usurious, is a proper consideration for a Court of Law. Let these Exceptions stand over until the question of Usury is tried at law, in an Action by the Mortgagee, on the Covenant in the second Mortgage Deed.

(b) If an usurious security be given for a legal subsisting Debt, although the Security is void, the Debt is not extinguished. *Phillips v. Cockayne*, 3 Campb. 119.

(c) A Party cannot recover on a new Instrument which

operates as a security for any usurious Interest, although founded upon a new Settlement of the Account between the Borrower and the Lender, and the original security has been cancelled. *Preston v. Jackson*, 2 Stark. 237.

THOMAS JENKINS, CHARLES GREENWOOD,
and RICHARD HENRY COX - - Plaintiffs;

And,

ROBERT HERRIES - - Defendant.

10th and 11th
February.

THIS was a Bill filed by the Vendors of certain Estates, situated at *Sidmouth in Devonshire*, against the Vendee, for a specific performance of his written Agreement to purchase such Estates for 15,000*l*.

Held, upon the construction of the whole Will, that an Estate Tail passed, where the literal force of expressions differs in a Will, it is a true Rule to seek the intention of the Devisor, rather in a consistent and rational purpose, than in a purpose inconsistent and irrational.

The Defendant having, by his Answer, objected that the Plaintiff could not make a good Title, an Order was made, referring it to *Master Stratford*, to inquire, whether the Plaintiffs could make a good Title.

The *Master*, by his Report, stated, that he was of opinion that the Plaintiffs could make a good Title to the Defendant upon his being indemnified, as well against the several Annuities and Legacies given and bequeathed by the Will of *Thomas Jenkins, Esq.* deceased, in the Abstract set forth, or such of them respectively as did then remain charges upon the Premises, as also such Annuities and other Incumbrances as had been charged thereon by the Plaintiff *Thomas Jenkins*, and were then unsatisfied; and upon his having the legal Estate in Fee, which, as appeared from the Abstract, was then vested in *John Lord Rolle, Joseph Jenkins, and Charlotte Manley*, (late *Charlotte Jenkins*,) the Devisees in Trust thereof, named in the said Will of the said *Thomas Jenkins*, conveyed to him, or as he should direct.

Query, Where a Devisor has expressed an intent to exclude A. from the descent, will a Court, in order to effectuate the general intent, give an Estate which may descend to A.?

1819.

T. JENKINS
and others,
v.
R. HERRIES.

To this Report an Exception was taken, that the *Master*, instead of certifying as before stated, ought to have certified,—that the Plaintiffs cannot make a good Title to the Estate and Premises, for that the Plaintiff *Thomas Jenkins* took an Estate for life only, under the Will of his Great Uncle *Thomas Jenkins*, deceased, the Testator in the Pleadings named; or, in case the Plaintiff *Thomas Jenkins* did take an Estate Tail under the said Will, for that the Recovery suffered by him did not effectually bar such Estate Tail and the Remainders over.

The Will of *Thomas Jenkins*, the Great Uncle of the Plaintiff, upon the construction of which the Exception was to be determined, was made at *Rome*, 15th December 1797, and duly executed and attested to pass real Estates; and, after giving certain specific and other Legacies, was as follows:—

“ The following pieces of Plate, to be sent to *England* to my Executors, for the use of my Heir:—An Eparne, being an Ornament to place in the middle of a table for a desert; which was a present to me from his Royal Highness the Duke of *Gloucester*, whose Arms are engraved upon it; a Silver Bread-Basket; two Stands for Oil and Vinegar; a Stand with a Lamp in it to place a Dish on it; two Silver Soup-Ladles, in the form of Shells; a Silver Coffee-pot, with its Plate to stand on; No. 4, Saltsellers; and No. 6, Tickets for Bottles; the fine Chimney in my Sitting-room, on the first floor of my house in *Rome*, is likewise to be sent to my Heir in *England*, which I desire may be placed in the House he may destine for his residence, to remain to his Heir. To *John Lord Rolle*, my Nephew *Joseph Jenkins*, Son of

1819.

T. JENKINS.
and others,
v.
R. HERRING.

my Brother *William*, deceased, and to my dearly beloved Niece *Charlotte Jenkins*, Daughter of the same, all my Lands and Effects in *Devonshire*, in the Kingdom of *England* or elsewhere, be they Lands, Hereditaments, Perpetuities, and every kind of Effects, named or not named, on the following Conditions; declaring that the said *John Lord Rolle*, *Joseph Jenkins* and *Charlotte Jenkins*, Executors of this my last Will, their Heirs and Assigns, for the forenamed disposition of my Effects in this my Will; and for the further dispositions that I shall hereafter make, I request they will in all things conform to what I have directed to be paid in *Rome*; further, that within two years after my Death, they cause to be paid to my Nephew the Rev. *William Jenkins*, eldest Son of my late Brother *William*, the Sum of 2,500*l.* sterling, on the express conditions, and not otherwise(*d*), having in this my Will, as shall be hereafter expressed, given *Cutford* with all its dependencies, to my Nephew *Joseph Jenkins*, which I have a right to do, by having paid off a Mortgage of 500*l.* sterling that was on the said Estate, as well as many other considerable Sums for Debts contracted by my late Brother and his Wife. On my paying the above-mentioned Mortgage, it was then agreed that my Sister-in-law, Wife of my Brother. *William*, was to give *Cutford*, with all its Dependencies, to her Son *Joseph*; and that in case my Nephew *William* had any claim on the said Estate, he was to renounce it in favour of his Brother *Joseph*; therefore, if he has not already complied with and fulfilled this Agreement, that previous to his Legacy of 2,500*l.* being paid he does all and singular Acts to confirm his Brother *Joseph*, after his Mother's death, to be the sole Proprietor of the said Estate of *Cutford* in the

(*d*) The Will is stated *verbatim* from the Brief.

1819.

T. JENKINS
and others,
v.
R. HERBIES.

Parish of *Sidbury*, otherwise this Legacy I declare to be null and void. Further, to prevent all superfluous Claims and Pretensions, as far as in my power, I declare this said Legacy of 2,500*l.* sterling, is to be considered and received by my said Nephew *William*, as a full Compensation for all trouble he may have had regarding the management and superintendence of my Estates and Affairs in *Devonshire*; and that on receiving this said Sum of 2,500*l.* he confesses this to be in full of all demands on me: To my Nephew *Joseph Jenkins*, Son of my Brother *William*, I give and devise unto him and his Heirs, the forenamed Estate of *Cutford* and *Cinderborough*, thereto adjoining; likewise the Farms of *Binden* and *Roughlear*, in the Parish of *Armouth* in the county of *Devon*, with all and every Appurtenances of Tithes, &c. thereto belonging, on the following Conditions; that he be immediately, on my decease, put in Possession of the said Estates, to enjoy them during his Life, and to his lawful Issue; but in case he should die without leaving any legitimate Son or Daughter, in such case the said Estates are to descend to my Heir; but in order that my said Nephew *Joseph* may have it in his power to show kindness to any Person whom he may judge proper, I give him the sum of 1,000 *l.* to be disposed of as he thinks fit, obliging my Heir to make the said Payment, for which the forenamed Estates are to be considered and held as a Surety for the said Payment: To my Nephew *Thomas Jenkins*, Son of my Brother *William*, I desire and direct that my Executors and Heir do cause to be paid to him, from the Income of my Estates, the Sum of 100*l.* sterling per annum, during his Life, and that at his Death, he may dispose of the Sum of 200*l.* sterling, in such manner as he may judge fit, for the payment thereof my Estates are held bound.

To my Niece *Sarah*, eldest Daughter of my Brother *William*, deceased, she being married to Mr. *Salter*, I desire and direct my Executors and Heirs to cause to be paid to her during her life-time, the Interest of 2,000*l.* sterling, at the rate of five *per Cent.*; and at her Death, the Sum of 2,000*l.* to be paid in equal proportions amongst her Children. To my dearly beloved Niece *Charlotte*, Daughter of my Brother *William*, I give and bequeath the Sum of 2,000*l.* sterling, on the following Conditions; that my Executors and Heir do pay her the annual Interest of Five per-cent. on the said 2,000*l.* till she marries, or should die; on her Marriage, to take all possible care that the said Sum be duly vested in Trustees hands for the security thereof, during her Life, and for the benefit of her Children; in case my said Niece *Charlotte* should never marry, at her Death I give her full liberty to dispose of the sum of 500*l.* sterling, to whomsoever she thinks fit; the sum of 500*l.* sterling to her Sister *Sarah* and her Children, and the remainder 1,000*l.* to be the Property of my Heir.

1819.

T. JENKINS
and others,
v.
R. HERRIES.

“ I name and appoint my universal Heir my great Nephew, *Thomas Jenkins*, (meaning the Plaintiff) eldest Son of my Nephew *William*, to whom I give all my Lands and Effects in *Devonshire*, in the Kingdom of *England* or elsewhere, be they Lands, Hereditaments, Perpetuities, and every kind of Effects whatsoever, named or not named, on the following Conditions; that he may not be put into Possession of any of the said Estates or Effects until he arrives at the age of 21 years. I declare my said great Nephew and Godson *Thomas* (meaning the Plaintiff) to be my universal Heir. I direct that from the time of my Death, the Sum of 500*l.* per annua, may be by my Executors paid for his

1819.

T. JENKINS
and others, •
v.
R. HERRIES.

Education; if my said great Nephew *Thomas* (meaning the Plaintiff) should marry, have a Child or Children, if living at his Death, I will and direct that my Estates do descend to his eldest Son; and if he has other legitimate Children, that out of my Estates be paid the Sum of 1,000*l.* to each of the said Children, be they Male or Female; but if it should happen that he leave one Daughter only, in such case, that she shall have out of my Estates the Sum of 3,000*l.* sterling; it is always to be understood, that if my great Nephew *Thomas* (meaning the Plaintiff) should have more Sons than one, if the eldest Son should die before his Father, he is to be succeeded by his second Son, and so on to the third, &c.; the eldest Son of my Godson *Thomas* (meaning Plaintiff) who may be living at his Father's death, is always to be considered as Heir to my Estate; should it happen that my said great Nephew *Thomas* leaves no Male Child, to as many Females as may be living at his death, my Will is, that the Sum of 2,000*l.* sterling be given to each Female; and if but one Daughter only, the Sum of 3,000*l.* sterling as expressed in the foregoing page; if my Godson and great Nephew *Thomas* (meaning Plaintiff) should not leave any Son at his Death, I then direct that his next Brother, and second Son of my Nephew *William*, succeed to my Estate, and so on, in case of failure of Male Heirs, to the third, fourth, &c.: the eldest great Nephew living, is always to be considered as my legitimate Heir, in case of failure of the other Brothers; my express Will and Desire being, that my Estates do always descend in the Male line. It is always to be understood, that in case my Estates descend from one great Nephew to another, the same Conditions as to the Sum to be paid to such Females as may be left, are to be observed

by all whose Father may die without Heir Male, as is expressed in favour of the Daughters of my great Nephew *Thomas* (meaning Plaintiff). Should it happen that all the Sons of my Nephew *William* should die without leaving a Son, or Sons, in such case, my Will is, that my Estates do devolve and be the property of my Nephew *Joseph Jenkins*, Son of my Brother *William*, on the same condition relative to his Heirs and Descendants, Male and Female, as is expressed regarding my great Nephew *Thomas* (meaning Plaintiff) and his Brothers; and if my said Nephew *Joseph* should die without a legitimate Son, then I direct and desire that my said Estates descend to my Nephew *Thomas* and his Heirs, on the same Conditions as expressed relative to his brother *Joseph*."

1819.

T. JENKINS
and others,
v.
R. HERRIES.

It appeared upon the Abstract of the Title, that *Thomas Jenkins*, Esq. the Testator, (who lived for many years previous to his death, at *Rome*, and died there,) was the Purchaser of the Lands in question, which he devised, by the foregoing Will in the terms there stated, to the Plaintiff *Thomas Jenkins*, his Great Nephew;—and that he, by Indenture, 15th *April* 1809, charged the Estate with two Annuities for 99 years, determinable on the deaths of himself and his Brother *William Jenkins*; and, by the same Deed, demised the Estate to *James Manning*, for a term of 200 years, in Trust, for better securing the two Annuities;—and that by Indentures, dated the 8th and 9th of *November* 1810, the Plaintiff *Thomas Jenkins* conveyed the Estate to *Thomas Henry*, to make him Tenant to the *Præcipe*, for suffering a common Recovery, which it was thereby declared should enure to the use of the said *Thomas Jenkins*, his Heirs and Assigns for ever; and in *Michaelmas* Term,

1819.

T. JENKINS
and others,
v.
R. HERRIES.

1810, a Recovery was suffered accordingly, wherein the said *Thomas Jenkins* was vouched.

It also appeared by the said Abstract, that by Indentures, dated the 24th and 25th April 1815, the Plaintiff *Thomas Jenkins* conveyed the said Estate (subject to the said Annuities) to the Plaintiffs *Greenwood and Cox*, in Trust to sell the same; and out of the Purchase Money to pay off the Annuities and the Debts to them, and to pay over the Surplus to the Plaintiff *Thomas Jenkins*.

Mr. *Horne*, and Mr. *Preston*, in support of the Exception:—

The first point to be considered is, Whether the legal Estate is not in the Trustees named in the Will. Under the Will of Mr. *Jenkins*, the legal Estate vested in the Trustees, Lord *Rolle*, Joseph *Jenkins*, and Charlotte *Jenkins*, during the lives of the Annuitants William *Jenkins*, Sarah *Salter*, and Charlotte *Jenkins*, the Estate being expressly devised to the Trustees and their Heirs for permanent purposes, viz. to pay the Annuities out of the Income of the Testator's Estates; consequently, the Recovery suffered by the Plaintiff in 1810 is invalid, and no good Title can be made. That the legal Estate must be considered to be in the Trustees, is clear from various Cases, *Jones v. Lord Say and Seale* (d), *Shapland v. Smith* (e), *Venables v. Morris* (f): the Case of *Doe v Simpson* (g), to the contrary, has been in effect overruled by the subsequent Case of *Doe v. Willan* (h).

(d) Eq. Cas. Abr. 383.

(e) 1 Bro. C. C. 74.

(f) 7 T. R. 343, 438.

(g) 5 East, 162.

(h) 2 Barn. & Ald. 84.

If the Estate remained in the Trustees, and a Conveyance is to be made by them according to the Will, it is an Executory Trust; and the Court, in directing a Conveyance, would act in the same way as it does in the case of Marriage Articles, by giving to the Intention of the Testator an entire effect.

1819.
T. JENKINS
and others,
v.
R. HARRIS.

The next question is, What was the quantity of Estate which the Plaintiff *Thomas Jenkins* took under the Will? We contend he only took an Estate for Life; the Plaintiffs insist he took an Estate Tail. If the Devise had closed with the words, "I appoint my *universal* Heir, my great Nephew, *Thomas Jenkins*, &c. to whom I give all my Lands and Effects, &c. be they Lands, Hereditaments and Perpetuities," this would have given him the Fee Simple. But there are other words qualifying the effect of this general Devise.

The intention of the Testator is expressed in the Will to be, that if his great Nephew *Thomas* should have a Child or Children living at his decease, his Estates should descend to his eldest Son; and that if *Thomas* should have more than one, and if "the eldest Son should die before his Father," he is "to be succeeded by his second Son," &c. The intention, therefore, in this part of the Will is plainly expressed, and according to the words of the Will, if the eldest Son has more Sons than one, and the eldest of such Sons should die before his Father, leaving Issue, such Issue would not take, but the second Son takes the Estate. Whether or not the Testator contemplated the possibility of an eldest Son dying in the life-time of *Thomas*, having Issue Male, cannot with certainty be predicated. There is an express Gift to the eldest, second and other

1819.

T. JENKINS
and others,
v.

R. HERRIES.

Sons, and therefore there is no occasion to raise an Estate Tail in order that his Sons may take. If he meant so, he has not expressed it, and we must follow the intent as expressed, however absurd and capricious it may be. It may be contended, that afterwards, in the Will, the Testator says, that it was his express will and desire that his Estate should *descend* in the Male Line, from which words it will probably be contended that an intention is evidenced, that he meant that the Estate should go in a course of descent to Males, and that this being the general intent, the particular intent must be sacrificed to it. But we deny that these words afford evidence of such a general intent. If the word *descend* were, as it may be, read *remain* or *devolve*, then all the parts of the Will would be rendered consistent. By "Male Line," the Testator meant the persons before designated. If this is to be considered as an Estate Tail in the Plaintiff, the Portion of 1,000*l.* a-piece to his younger Children being contingent, might be defeated by a Recovery, and the eldest Son would take through his Father, and the younger Children take in their own right, which is inconsistent with the idea of an entail. The particular intent is clear, and the general intent is equivocal, and should, if possible, be construed so as to be consistent with the particular intent. But suppose there be a particular intent expressed, and also a general intent inconsistent with the particular intent, it is not a general Rule without exception that the particular intent must be sacrificed to the general Intent, for if the general intention is in favour of objects not provided for by the particular intention, the particular intention is not allowed to be sacrificed to the general intention. So, if particu-

1819.

T. JENKINS
and others,
v.
R. HERRIES.

lar Gifts are consistent with the general intention, the Court never excludes them, as appears from *Robinson v. Robinson* (k). *Doe v. Hallen* (l). *Attorney General v. Sutton* (m), and *Blackborne v. Edgley* (n). In *Bamfield v. Popham* (o), it was expressly determined that no Estate raised by Implication in a Will can destroy an express Estate; in that case the Devise was to A. for Life, remainder to his first Son, and so to every other Son in Tail Male, and for want of Issue Male of A., remainder over; and it was held, that this was not an Estate Tail in A. by implication.

The intention of this Testator was to give the Father an Estate for Life, and an Estate Tail to his eldest surviving Son at his death, not as Issue but as Purchaser, and by such a construction all the objects of the Will will be answered; but if the Father is construed to take an Estate Tail, persons not intended will take, and the purposes of the Will may be frustrated, for the portions charged on the Estate being contingent, they will be defeated by a Recovery.

Mr. Bell, and Mr. Sugden, contra:—

We contend that an Estate Tail was given by the Will to the Plaintiff *Thomas Jenkins*, with remainder to the second, third and other Sons of *William*, the Father of *Thomas*, in Tail Male.

The Will exhibits a *particular*, and a *general* inten-

(k) 1 Burr. 44.

(n) 1 P. Wms. 605.

(l) 8 T. R. p. 5.

(o) 1 P. Wms. 54.

(m) 1 P. Wms. 754. S. C.

2 Bro. P. C. 382.

1819.

T. JENKINS
and others;
v.
R. HERRING.

tion, and according to the cases the general intention must take place where it is inconsistent with the particular intention. This doctrine is laid down in a variety of cases, and is exemplified in the cases quoted on the other side; it is a very old doctrine, as appears from the Case of *Spalding v. Spalding* (p), cited by Lord Chief Justice Hale in *King v. Milling* (q), in which case there was a Devise to the eldest Son of the Devisor, and the Heirs of his Body, after the death of his Wife, and if he died living the Wife, then to the Testator's second Son and the Heirs of his body; the first Son died, living the Wife, but leaving Issue; and it was ruled by all the Court, that it was an absolute Estate Tail in the eldest Son, and as if the words had been, if he died without Issue, living the Wife. This construction was adopted by Lord Maclesfield, in *Newland v. Sheppard* (r). The intent of the Testator in this Case could not have been to give the Estate to a second Son, if the eldest died in the life-time of the Father having issue. The youngest of many Sons might thus succeed to the Estate upon the death of *Thomas*, in preference to the Issue Male of his elder Brothers. The Testator in the first part of his Will, appointing his Great Nephew the Plaintiff, "Universal Heir," gave a Fee, but then he afterwards uses language which shows that he meant to give, not an absolute Interest, but an Estate Tail. In a subsequent part of the Will the Testator states it to be his "express will and desire that his Estates should descend in the Male Line," but that which is a rational intention could not take place unless *Thomas* took an Estate Tail; for according

(p) Cro. Car. 185.
(q) 1 Ventr. 230.

(r) 2 P. Wms. 194.

to the Argument on the other side, the strange intention is imputed to the Testator, that if *Thomas* has many Sons, and all but the youngest die before *Thomas*, leaving Issue Male, the youngest Son and his Issue would take in exclusion of the Issue Male of all his elder Brothers. In *Evans v. Astley* (s), it was held, that on a Devise to the three Sons of C successively in Tail Male, Remainder to every Son and Sons of C by S his Wife, and for want of Issue to H, that the after-born Sons took several Estates in Tail Male in succession; and that the words, "for want of such Issue," must be construed, for want of Heirs Male of the Body.

1819.
T. JENKINS
and others,
v.
R. HERRICK.

There is no authority for the position, that in order to warrant the sacrifice of a particular intent to the general intent, the latter must be in favour of the same persons who were benefited by the former. In *Doe v. Cooper* (t), Lord *Kenyon* says, generally, "It has been the settled doctrine of *Westminster Hall* for the preceding forty or fifty years, that there might be a general and a particular Intent in a Will; and that the latter must give way, when the former could not otherwise be carried into effect."

The Rule thus laid down is broad, general and unqualified, without any exceptions. *Doe v. Candell* (u), is another Authority to show, that to answer a clear intention, the Court will give an adequate Estate.

The Portions given by the Will are not inconsistent with an intention to give an Estate Tail to the first taker.

(s) 3 Burr. 1570.
(t) 1 East, 229.

(u) 9 East, 400.

1819.

T. JENKINS
and others,
v.
R. HERRIES.

The whole Fee passed to the Trustees until the Plaintiff *Thomas Jenkins* attained twenty-one, but did not remain in them after that event took place. When another part of the Estate in question was sold by the Plaintiff *Thomas Jenkins* to a Mr. *Gould*, the Purchaser objected to the Title, and on a Bill for a specific performance, a Case was sent to the Court of King's Bench, and after argument, the Certificate of the Judges, dated 14th *December* 1812, was, "That the Plaintiff took an Estate Tail under the Will of *Thomas Jenkins*, the Testator, in the Lands devised to him." That Court would not have decided upon the Case, if they had supposed the legal Estate was in the Trustees, and not in the Plaintiff *Thomas Jenkins*, and that it was the case of an executory Trust. That Case came on afterwards, on further directions, before the late *Vice-Chancellor*, sitting for the *Lord Chancellor*, and he, on the 10th *December* 1813, confirmed the Certificate, and directed a specific performance. The determination in that Suit, though not binding in this Cause, which is between different parties, must still be considered as a weighty authority in support of that construction of the Will for which we contend; a construction, by which all the purposes of the Will will be answered. It may be observed, that the Testator, who was resident at *Rome* when he made his Will, possessed a curious Chimney Piece, which he directs to be sent "to my *Heir* in *England*, which I desire may be placed in the House he may destine for his residence, to remain to his *Heir*." It is not to be supposed he meant that this Chimney Piece, which he seems to have considered as a sort of heir-loom, was to go to the Heir of the Plaintiff, and that the Estate should go to another. It is a circumstance to show that an Estate Tail was intended.

The VICE-CHANCELLOR:—

The point in this Case, has already been decided between *Thomas Jenkins* and other Parties, by the Court of King's Bench; but, certainly, the Defendant in this Cause is not bound by that decision. It may be questionable whether the Plaintiff has a legal or equitable Estate, but for the present purpose it is immaterial. The Court of King's Bench held, that in order to effectuate the general intention of the Devisor, the Plaintiff *Thomas Jenkins* must take an Estate-tail. It is objected, that such an Estate-tail would descend to the Sons of his Sons who should die in his life-time; and that such Sons of Sons are expressly excluded by the Will. It is certain that no Case has yet occurred, in which the expressed intention to exclude particular persons has been disregarded; and to let in those to the descent whom the Devisor has rejected, would seem to be rather to make a new Will for the Devisor, than to execute the Will which he had made. I am of opinion, however, that the objection does not, in fact, apply to this Case. It is plain, from the several passages in this Will, most of which have been referred to in the Argument, that the Devisor did not intend that his Estate should go over from the family of one great Nephew, to another, unless upon the general failure of Issue Male of his first great Nephew. It is plain from these passages, therefore, that it was his intention not to exclude, but to include, the Sons of Sons who should die, living their Father. It is true, that there are other passages in which the Devisor states, that if the eldest Son, or other the Sons of the first great Nephew should die in the life-time of the Father, that the Estate is to go over to others, without

1819.

T. JENKINS
and others,
v.
R. HERRIES.

1819.

T. JENKINS
and others,

v.

R. HERRIES.

providing for the event of the deceased Sons leaving Male Issue. But having regard to the other expressed intent, that such Estate is only to go over upon the general failure of Issue Male of the first great Nephew, and to the consistent and rational character of that intention, I am bound to conclude that he did not refer in the other expression to the possible contingency of Sons dying in the life-time of their Father, leaving Sons, not because he meant to exclude such Sons, but because that contingency did not happen to occur to him. Where the literal force of expressions differs in a Will, it must be a true rule to seek for the intention of the Devisor rather in a consistent and rational purpose, than in a purpose inconsistent and irrational; and more especially when the difference may arise only from the Devisor not having present to his mind an event which is not in the natural order of things.

Decree a specific Performance.

1819.

9th February.

Between The Most Noble CHARLES Duke of NORFOLK since deceased, BARNARD EDWARD HOWARD, Esq. now Duke of NORFOLK, and the Honourable EDWARD ROBERT PETRE an Infant, under the Age of Twenty-one years, by the said BARNARD EDWARD HOWARD his next Friend, which said CHARLES DUKE of NORFOLK, and BARNARD EDWARD HOWARD, were Trustees for, and the said EDWARD ROBERT PETRE claims to be beneficially entitled to the Manor or Lordship and Town of *Selby* in the County of *York*, together with certain Corn Mills there, called *Selby Mills*; and JOHN RICHARDSON and WILLIAM MASSEY; Millers and Co-partners, the Tenants or Occupiers of the said Mills - - - Plaintiffs;

And

ROBERT MYERS, JOHN CAPES, JOHN BRADLEY and SUSANNA WALKER, Widow, Resiants and Inhabitants within the said Manor or Lordship and Town of *Selby*; and WILLIAM WALKER, charged to be another Resiant and Inhabitant of the same Town - Defendants.

THE Bill stated, that the Manor or Lordship and Town of *Selby* in the County of *York*, with its Rights, Royalties, Privileges and Appurtenances, together with *This Court has Jurisdiction to decree Toll, due by custom, in respect of a Mill, although the Custom was established in a former Suit. It appearing, however, in this Case, that ancient Mills were destroyed, and another Mill, of a different kind erected, and that other legal objections were taken, the Court retained the Bill, with liberty to the Plaintiffs to bring such action or actions at law as they should be advised.*

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

the two ancient Corn Mills called *Selby Mills*, situate within the said Manor or Lordship, and which were, a few years since, converted into one Mill; and which Mills were formerly worked by means of certain ancient water-streams, and were for several years afterwards, and until lately, worked by wind; but the said present Mill is now, and for some time past hath been worked by a *steam engine*; and together with the suit soken, suit grist, mulcture and toll, to the same Mills belonging, did with other Hereditaments and Premises, several years since, become legally vested in Plaintiffs *Charles Duke of Norfolk* and *Barnard Edward Howard*, and Sir *Francis Molyneux* since deceased, and their Heirs, upon certain Trusts, for the benefit of Plaintiff *Edward Robert Petre* and other Persons; and that said Plaintiff *Edward Robert Petre*, before the year 1813, became and is beneficially entitled in possession for his Life to the said Manor or Lordship, Mills and Mill, soke soken, suit grist, mulcture, toll, Hereditaments, and Premises; and Plaintiffs *Charles Duke of Norfolk*, and *Barnard Edward Howard*, were, previous to the said year 1813, and ever since has been, and still are, as such Trustees aforesaid, in the possession or receipt of the Rents and Profits of the said Manor, Hereditaments and Premises; and that there was formerly a *Horse-mill* belonging to and within the said Manor, for the grinding of Corn for the Tenants, Resiants and Inhabitants of and within such Manor or Lordship, but which Horse-mill was several years since pulled down or destroyed:—That in the Month of *April* 1813, the said Mill, (such two Mills having been previously converted into one Mill, as aforesaid,) and the soke, soken, suit, grist, mulcture, and toll thereunto belonging, were let to Plaintiffs *John Richardson* and

William Massey, by Plaintiffs *Charles Duke of Norfolk* and *Barnard Edward Howard*, as Trustees as aforesaid, at a very considerable yearly Rent; and they, Plaintiffs *John Richardson* and *William Massey*, have ever since been, and now are, the Tenants and Occupiers thereof at such yearly Rent:—That the Town of *Selby* is an ancient town, and is part of and wholly within the said Manor or Lordship and that all the Tenants, Resiants, Inhabitants and Dwellers of and within the said Manor, Lordship or Town, have been from time immemorial, either by ancient Usage, or Custom, or Right of Tenure, of such Manor or Lordship, or otherwise, used and accustomed, and of duty bound to grind, and still ought to grind, or to have ground at the said Mills, or one of them, and still are bound to grind, or to have ground at the said present Mill, such two water Corn Mills being now converted into one as aforesaid, and not elsewhere, all the Corn and Grain and Malt which they or any of them have or hath expended, or consumed, or do or doth, or shall expend or consume in a ground state, in their respective Dwelling-houses within the said Manor, Lordship or Town, and which they or any of them have or hath sold or exposed to Sale, or do or doth sell or expose to sale, in a ground state, within such Manor, Lordship or Town, to any others of the Tenants, Resiants, Inhabitants, or Dwellers of or within the said Manor, Lordship or Town, to be used, spent, or consumed in their respective Dwelling-houses within such Manor, Lordship or Town, whether grown or produced within the said Manor, Lordship or Town, or brought thither from any other places or place; and they the said Tenants, Resiants, Inhabitants and Dwellers have immemorially become, and are by such usage and custom bound and obliged to

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

pay to the Owners or Owner of the said Mills, and still are bound and obliged to pay to the Owner or Owners of said Mill for the time being, or their Lessees or Lessee, a reasonable Toll or Mulcture for such the grinding of their said Corn, Grain and Malt, (that is to say) for Corn and Grain, except Malt, one sixteenth part thereof when brought to and taken from the said Mills or Mill by the owner of such Corn or Grain, and one twelfth part thereof, when fetched to and carried back from the said Mills or Mill, by the Owners or Owner for the time being of such Mills or Mill, or their, his or her Lessee or Lessees, or Workman or Servants; and for Malt, one thirty-second part thereof; and that none of the Tenants, Resiants, Inhabitants or Dwellers of or within the said Manor, Lordship or Town of *Selby*, have at any time during the time aforesaid been at liberty to grind or to have ground at any other Mills or Mill, any Corn, Grain or Malt spent or used in a ground state in their respective Houses or Dwellings within such Manor, Lordship or Town, or to sell or expose to sale within the said Manor, Lordship or Town, to any other of the said Tenants, Resiants, Inhabitants or Dwellers, any Corn, Grain or Malt in a ground state, not ground at the said Mills or Mill, so now belonging to Plaintiffs, or at one of such Mills, to be spent or used in their respective Houses or Dwellings within such Manor, Lordship or Town; and that the Owners for the time being of the said Mills or Mill, are and always have been bound and obliged to keep such Mills or Mill in good repair, and in a proper state for working, and to grind all the Corn, Grain and Malt brought thither to be ground by the Tenants, Resiants, Inhabitants and Dwellers of and within the said Manor or Lordship and

Town for the use and consumption of such Tenants, Resiants and Inhabitants in their Houses and Dwellings within such Manor or Lordship and Town, within the space of twenty-four hours from the time of the delivery of the same at such Mills or Mill, if so required. That the said Mills, until the same were so converted into one Mill as aforesaid, constantly were, and the same Mill now is in good and proper repair, and in a fit state for working, and capable of grinding within the said space of time, all the Corn, Grain and Malt used and consumed in a ground state by the Tenants, Resiants, Inhabitants or Dwellers of or within the said Manor or Lordship and Town:—That *Robert Myers, John Capes* and *Thomas Bradley*, have respectively, ever since the year 1812, been and still are Resiants and Inhabitants of and within the said Manor or Lordship, and Town of *Selby*, and that they the said *Robert Myers, John Capes* and *John Bradley*, have respectively from time to time, or at divers times since the month of *April* 1813, ground or caused to be ground, at or by their own Mills, in the said Manor or Lordship, or at some Mills or Mill other than Plaintiff's said Mills, or any or either of them, considerable quantities of Malt, in order that such Malt might be, and the same hath accordingly been spent, used and consumed by them in a ground state, in their respective Dwelling-houses within the said Manor or Lordship and Town; and they the said *Robert Myers, John Capes*, and *John Bradley* have respectively so done and acted, for the purpose of evading the payment, to Plaintiffs *John Richardson* and *William Massey*, as the Tenants and Occupiers of the said Mills, of the said customary Toll or Mulcture, so payable for the grinding of Malt,

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

at such their Mill as aforesaid. Plaintiffs insist, that the said *Robert Myer*, *John Capes* and *John Bradley*, ought respectively to render an account to Plaintiffs *John Richardson* and *William Massey*, of the quantities and value of the Malt so ground or caused to be ground by them, at or by such their own Mills, or any other Mills or Mill than Plaintiffs said Mill, or one of them, since the said month of *April* 1813, and ought to pay to said last-named Plaintiffs the full amount of the aforesaid customary Toll or Mulcture, which would have accrued or become payable or due to the Plaintiffs, in case such Malt had been, as the same ought to have been, ground at the said Mill of Plaintiffs, or one of such Mills.

That *William Walker* and *Susanna Walker* have respectively, ever since the said year 1812, been and still are Resiants and Inhabitants of or within the said Manor or Lordship and Town of *Selby*, and that the said *William Walker* and *Susanna Walker* have respectively, from time to time, or at divers times since the said month of *April* 1813, offered and exposed to Sale, and sold at or in some Shop, House or Dwelling within the said Manor or Lordship, and Town of *Selby*, or some or one of those places, to divers other of the Resiants and Inhabitants of or within the said Manor, Lordship and Town, to be used, seopt and consumed in their respective Houses or Dwellings within such Manor or Lordship and Town, great quantities of Meal and Flour, the produce of, or obtained from Corn or Grain not ground at the said Mill of Plaintiffs, or at either of such Mills, and by which means Plaintiffs *John Richardson* and *William Massey* have been de-

frauded of the said Toll or Mulcture, which would have accrued or become payable or due to them in case such Corn or Grain had been ground at the said Mill of Plaintiffs; and Plaintiffs humbly insist, that they are entitled to a Discovery and Account from the said *William Walker* and *Susanna Walker* of the quantities and value of the said Corn and Grain so sold, ground as aforesaid, and not ground at the Mill of Plaintiffs, or at one of such Mills, and the quantities and value of the Toll or Mulcture, which would have accrued or become payable to Plaintiffs. *John Richardson* and *William Massey* in respect thereof, in case such Corn or Grain had been ground at the said Mill of Plaintiffs, and the said *William Walker* and *Susanna Walker* ought to pay to said last-named Plaintiffs the amount of such Toll or Mulcture: That Plaintiffs *John Richardson* and *William Massey* have frequently applied to and requested the said *Robert Myers*, *John Capes* and *John Bradley*, to render an account to said last-named Plaintiffs, of the quantities and value of the Malt ground or caused to be ground by them the said *Robert Myers*, *John Capes* and *John Bradley*, respectively, since the said month of *April* 1813, at any other Mills or Mill than the said Mill of Plaintiffs, or one of such Mills, and which Malt hath been spent, used or consumed in the respective Houses or Dwellings of them the said *Robert Myers*, *John Capes* and *John Bradley* respectively, within the said Manor or Lordship and Town of *Selby*; and also an Account of the quantities and value of the aforesaid customary Toll or Mulcture which would have accrued, or become payable or due to said last-named Plaintiffs, for or in respect of the said Malt so ground, in case the same had been ground

1819.

Duke of
Norfolk
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,

v.
R. MYERS
and others.

at the said Mill of Plaintiffs, and to pay to said last Plaintiffs the full amount of such Toll or Mulcture, and to refrain from grinding or causing to be ground at any other Mills or Mill than the said Mill of Plaintiffs, any Malt to be spent, used or consumed in a ground state, at the Houses or Dwellings of them, the said *Robert Myers, John Capes and John Bradley* respectively, within the said Manor or Lordship and Town of *Selby*; and Plaintiffs have in like manner applied to and requested the said *William Walker and Susanna Walker* to render an account to Plaintiffs, *John Richardson and William Massey*, of the quantity and value of the Corn and Grain so sold, ground by them, or either of them, the said *William Walker and Susanna Walker* respectively, at any Houses, Dwellings, or House, Dwelling or Shop within the said Manor or Lordship and Town of *Selby*, since the said month of *April 1813* as aforesaid, and not ground at the said Mill of Plaintiffs; and also an Account of the quantities and value of the aforesaid customary Toll or Mulcture which would have accrued or become payable or due to Plaintiffs last named, for or in respect of the Corn and Grain so ground, in case the same had been ground at the said Mill of Plaintiffs, and to pay the said last-named Plaintiffs the full amount of such Toll or Mulcture, and to refrain from selling or exposing to sale, within the said Manor or Lordship and Town of *Selby*, any Meal or Flour, the produce of Corn or Grain ground at any other Mills or Mill than the said Mills of Plaintiffs; and they Plaintiffs hoped that such requests would have been complied with, as in Justice and Equity the same ought to have been: But, now so it is, &c.; Defendants combining, &c.

and contriving how to wrong and injure Plaintiffs in the Premises, have refused to comply with the requests aforesaid; and they give out and pretend that there is not any such immemorial Usage or Custom within the said Manor or Lordship and Town of *Selby* as is hereinbefore stated, and that the Tenants, Resiants, Inhabitants, or Dwellers of or within such Manor or Lordship and Town have not from time immemorial been accustomed, nor are bound to have the Corn, Grain, or Malt used, spent or consumed in their respective Houses or Dwellings within the said Manor or Lordship and Town, ground at the said Mills, nor are now bound to have the same ground at the said Mill of Plaintiffs, or at either of such Mills; and that the Tenants, Resiants, Inhabitants and Dwellers of the said Manor or Lordship and Town of *Selby* are, and always have been, at full and free liberty to use, spend or consume in their respective Houses or Dwellings within the said Manor or Lordship and Town of *Selby*, Malt and Meal and Flour, the produce of Corn and Grain ground at any other Mills or Mill than the said Mills or Mill of Plaintiffs; and that Plaintiffs *John Richardson* and *William Massey* are not entitled to receive from them, the said Confederates respectively, the aforesaid Toll or Mulcture, or any satisfaction for or in respect of the same. The Bill then charged the contrary, and that there not only is such immemorial Usage or Custom within the said Manor or Lordship and Town of *Selby* as aforesaid, but that the same hath been at different periods of time recognized, confirmed and established by Decrees made by His Majesty's Court of Exchequer at *Westminster*, in certain Suits instituted in such Court; and that, in particular, in *Hilary* Term, in the third year of the reign of his late Majesty King *Charles* the

1819.

Duke of
Norfolk
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others;
v.

R. MYERS
and others.

First, a Suit was instituted in the said Court of Exchequer, by or in the names of *Thomas Walmsly, Esq.* (the then Owner of the said Manor or Lordship of *Selby*, and of the two ancient Mills,) and certain other Persons, the then Lessees or Tenants of such Mills, against *Robert Marshall* and others, then Tenants, Resiants, and Inhabitants of and within the said Manor or Lordship and Town of *Selby*, touching the aforesaid Soke Suit and Mulcture and Toll; and that, by the Decree made on the hearing of such Cause, it was declared, that the said *Thomas Walmsly* had fully proved the aforesaid Custom, and it was, among other things, ordered and decreed, that the Defendants in such case, and all other the Tenants, Resiants and Inhabitants of and within the said Manor or Lordship and Town of *Selby*, that then were, or thereafter should be, should at all times thereafter grind all their Corn, Grain and Malt to be spent in their Houses within the said Manor and Town of *Selby*, at the said two ancient Mills; and that neither the said Defendant in the said Suit, nor any other of the Tenants, Resiants or Inhabitants of the said Manor or Town of *Selby*, should directly or indirectly carry or send, or cause to be carried or sent, their or any of their Corn, Grain or Malt, to be spent in any of their Houses in the said Manor and Town, to any other Mills or Mill to be ground. The Bill further charged, that, in *Hilary Term*, in the year 1726, another Suit was instituted in the said Court of Exchequer, by or in the names of *Catharine Lady Petre*, the Owner of the said Manor or Lordship of *Selby* and of the two ancient Mills, and certain other Persons the then Lessees or Tenants of such Mills, against *William Clarkson* and others, then Tenants, Resiants and Inhabitants of and within the said Manor or Lordship and Town of *Selby*,

for the purpose of compelling an Account and Payment by the said Defendants in that Suit of the aforesaid Toll or Mulcture, for or in respect of divers quantities of Corn and Grain which they had ground, or caused to be ground, at certain other Mills, and the Meal or Flour produced therefrom, they had spent, used and consumed, in their Houses or Dwellings within the said Manor or Lordship and Town; and for an Injunction to restrain the said Defendants from breaking or evading the said Custom or Soke in future: And by the Decree made and pronounced on the hearing of such last-mentioned Cause, dated the 26th day of *October* 1730, it was, among other things, ordered and decreed, that the custom thereinbefore mentioned, being the custom aforesaid, should be, and the same was thereby established, that the Defendants, and all other the Tenants, Resiants, Inhabitants and Dwellers within the said Manor or Lordship and Town of *Selby*, that then were, and that thereafter should be, should grind all their Corn, Grain and Malt, to be spent, ground in their Houses within the said Manor or Lordship and Town of *Selby* aforesaid, at the two ancient Corn Mills and Horse Mill in *Selby* aforesaid, being the Mills hereinbefore mentioned; and that neither the said Defendants, nor any other of the Tenants, Resiants or Inhabitants of the said Manor, Lordship, or Town of *Selby*, should directly or indirectly carry or send, or cause to be carried or sent, their or any of their Corn Grain or Malt, to be spent in any of their Houses in such Manor, Lordship or Town, to be ground at any other Mills or Mill as by the aforesaid Decrees, and to which, for greater certainty, Plaintiffs crave leave to refer, &c. The Bill then stated, that, at other times,

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS,
and others.

the said *Robert Myers, John Capes, John Bradley, William Walker, Susanna Walker*, admit the truths of the several matters hereinbefore mentioned; nevertheless they persist in refusing to comply with the aforesaid requests of Plaintiffs; and they, the said *Robert Myers, John Capes, and John Bradley*, threaten, and intend, to continue grinding, or causing to be ground, at other Mills than those of Plaintiffs; the Malt which they shall from time to time spend, use and consume, ground in their respective Houses or Dwellings within the said Manor or Lordship and Town of *Selby*; and the said *William Walker, and Susanna Walker*, threaten and intend to continue selling, or causing to be sold, within the said Manor or Lordship and Town of *Selby*, to the Tenants, Resiants and Inhabitants of or within such Manor, Lordship and Town, for the purpose of being used and consumed by them, in their respective Houses or Dwellings within the said Manor, Lordship or Town, Meal and Flour the produce of Corn and Grain not ground at the said Mill of Plaintiffs, or at either of such Mills. The *Prayer* of the Bill was, That the said Defendants may fully answer the Matters aforesaid; and that an Account may be taken of the quantity or value of the Malt ground, or caused to be ground, by the said *Robert Myers, John Capes, and John Bradley* respectively, since the said month of *April* 1813, at any other Mills or Mill than the said Mill of Plaintiffs, and which hath been spent, used or consumed, in a ground state, in the respective Houses or Dwellings of them the said *Robert Myers, John Capes, and John Bradley*, within the said Manor or Lordship or Town of *Selby*:—And also an Account of the quantities and value of the aforesaid customary Toll or Mulcture which would have been payable to Plaintiffs

John Richardson and *William Massey*, for or in respect of such Malt, in case the same had been ground at the said Mill of Plaintiffs; and that the full Amount of such Toll or Mulcture might be decreed to be paid to Plaintiffs *John Richardson* and *William Massey*, by the said *Robert Myers*, *John Capes*, and *John Bradley*, respectively; and that an account might be decreed to be taken of the quantity and value of the Meal and Flour which the said *William Walker* and *Susanna Walker* have respectively, since the said month of April 1813, sold, or caused to be sold, within the said Manor or Lordship and Town of *Seldy*, to any of the Tenants, Resiants, or Inhabitants of or within such Manor, Lordship or Town, to be by them used or consumed in their respective Houses or Dwellings within the same Manor, Lordship or Town, the produce of Corn or Grain not ground at the said Mill of Plaintiffs:—And also an Account of the quantity and value of the aforesaid customary Toll or Mulcture which would have been payable to Plaintiffs *John Richardson* and *William Massey*, for or in respect of Corn or Grain not ground at any or either of the said Mills of Plaintiffs:—And also an Account of the quantity and value of the aforesaid customary Toll or Mulcture which would have been payable to Plaintiffs *John Richardson* and *William Massey*, for or in respect of such Meal or Flour, in case the same had been the produce of Corn or Grain ground at the said Mills of Plaintiffs; and that the amount of such Toll or Mulcture might be decreed to be paid to Plaintiffs *John Richardson* and *William Massey*, by the said *William Walker* and *Susanna Walker* respectively; and that the said *Robert Myers*, *John Capes*, and *John Bradley*, might be respectively restrained, by the Order and Injunction of this honourable Court, from grinding

1819.

Duke of
Norfolk
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others
v.
R. MYERS,
and others.

or causing to be ground, at any other Mills or Mill, than the said Mill of Plaintiffs, any Malt to be spent, used or consumed, ground, at the Houses or Dwellings of them the said *Robert Myers*, *John Capes*, and *John Bradley* respectively; within the said Manor, Lordship and Town of *Selby*; and that the said *William Walker* and *Susanna Walker* might be restrained in like manner from selling or exposing to sale, or causing to be sold, or exposed to sale, within the said Manor or Lordship and Town of *Selby*, to any of the Tenants, Resiants, or Inhabitants, of or within such Manor, Lordship or Town, to be by them spent, used or consumed, in their respective Houses or Dwellings within the same Manor, Lordship or Town, any Meal or Flour, the Produce of Corn or Grain, not ground at the said Mill of Plaintiffs.

The Defendants, *Robert Myers*, *John Capes*, and *John Bradley*, and *William Walker*, by their joint and several Answers, stated, that they do not know, and cannot answer as to their Belief or otherwise, whether the Manor or Lordship of *Selby*, and the two Corn Mills and Horse Mill in the said Bill of Complaint, with the Soke, Soken, Suit, Grist, Mulcture, and Toll to the same Mills belonging, did not several Years since become legally vested in the said Plaintiffs, *Charles Duke of Norfolk*, and *Barnard Edward Howard*, and *Sir Thomas Molyneux*, now deceased, and their Heirs, upon certain Trusts for the Benefit of the said Plaintiff, *Edward Robert Petre*, and other Persons; but that Defendants believe, that in some way or other, but in what way they do not know, and cannot in any manner answer, the said Plaintiffs, *Charles Duke of Norfolk*, and *Barnard Edward Howard* were, previously to the Year 1813, and have ever since been and now are still in possession

or receipt of the Rents of the said Manor, Mills, Hereditaments and Premises: That the Mills now called *Selby Mills*, and which are the Mills mentioned in the said Bill, consist now only of one Corn Mill, worked by wind above, and by *steam-engine* below; and that there is not now, nor hath not for several years, been any Horse Mill at *Selby* belonging to said Plaintiffs, or any of them. And that until about some years ago there were two Corn Mills, as in the said Bill mentioned, which were worked by means of certain ancient water streams; and that about nine years ago the same two Corn Mills were converted into one Mill, which is adapted to be worked by, and is now worked by, wind above, aided and assisted by a steam-engine below:—That they believe, that in some way or other, but in what way they do not know, and cannot in any manner answer, the said Plaintiff, *Edward Robert Petre*, did before the year 1813 become, and is beneficially entitled in possession to the said Manor or Lordship, Mills, Soke, Suit, Grist, Mulcture, Toll, Hereditaments and Premises:—That they believe at or about the time in the said Bill mentioned, the said Mill, with the Soke, Soken, Suit, Grist, Mulcture and Toll thereto belonging, were let to the said Plaintiffs *John Richardson* and *William Massey*, along with other Hereditaments, at a considerable yearly rent; but these Defendants do not know, and cannot in any manner answer, whether the same were let by the said Plaintiffs, *Charles Duke of Norfolk* and *Barnard Edward Howard*, as Trustees, as in the said Bill mentioned, or by what other persons in particular.

Admit, that the said Plaintiffs, *John Richardson* and *William Massey*, have ever since been and are now the

VOL. IV. H

1819.

Duke of
NORFOLK
and others,
v
R. MYERS
and others.

1819.

Duke of
NORFOLK,
and others,

v.
R. MYERS
and others.

Tenants and Occupiers thereof at such yearly rent; and that the Town of *Selby* in the said Bill mentioned, is an ancient Town, and that the same is within and part of the Lordship or Manor of *Selby*.

Say, they are advised, and hope to be able to prove, that all the Tenants, Resiants, Inhabitants and Dwellers of and within the said Manor or Lordship and Town of *Selby*, have not been, from time to time immemorially, by ancient usage, custom or right of tenure, or otherwise, used and accustomed, and of duty bound, to grind or have ground, and ought not to grind or to have ground at the said Mill or Mills of the said Plaintiffs, or at any one of such Mills, and not elsewhere, all the Corn, Grain and Malt which they or any of them have or hath expended or consumed, or do or doth or shall expend or consume, in a ground state, in their respective Dwelling-Houses within the said Manor or Lordship and Town, and which they or any of them have or hath sold or exposed to sale, or do or doth sell or expose to sale in a ground state within such Manor or Lordship and Town, to any other of the said Tenants, Resiants, Inhabitants or Dwellers, to be used, spent or consumed in their respective Dwelling-Houses within such Manor, or Lordship or Town:—Say, they are advised, and hope to be able to prove, that the said Tenants, Resiants, Inhabitants and Dwellers, have not immemorially been, and are not bound and obliged, and ought not to pay, to the owner or owners of the said Mills for the time being, or their lessees or lessee such reasonable Toll or Mulcture for such the grinding of the said Corn, Grain or Malt:—Say, they are informed and believe that several of the Tenants, Resiants, Inhabitants or Dwellers of or within the said Manor

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

or Lordship and Town of *Selby*, have for several years last past been at liberty to grind, or to have ground, at any other Mills or Mill than the said Mills of the said Plaintiffs, any Corn, Grain or Malt spent or used in a ground state in their respective Houses and Dwellings within such Manor or Lordship and Town, or to sell or expose for sale within the said Manor or Lordship and Town, any Corn, Grain or Malt in a ground state, not ground at the said Mills of the said Plaintiffs, or one of such Mills.

Say, they are advised, and hope to be able to prove, that the owners for the time being of the said Mills of the said Plaintiffs, are not, and have not always been bound and obliged to keep such Mills in good repair, and in a proper state for working, or to grind all the Corn, Grain and Malt brought thither to be ground by the Tenants, Resiants, Inhabitants and Dwellers of or within the said Manor or Lordship and Town, for the use and consumption of such Resiants and Inhabitants in their Houses and Dwellings within the said Manor or Lordship and Town, within the space of time in the said Bill mentioned, if so required, or within any other space of time.

Say, they are informed and believe, that the said Mills of the said Plaintiffs are not, and have not been, constantly in good and proper repair, and in a fit state for working, and capable of grinding within the space of time in the said Bill mentioned, all the Corn, Grain and Malt used and consumed in a ground state by the Tenants, Resiants, Inhabitants or Dwellers of and within the Manor or Lordship and Town of *Selby*, in such their Houses and Dwellings.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Say, they admit that the said *Robert Myers, John Capes* and *John Bradley* have respectively, ever since the year 1812, been and are still Resiants and Inhabitants of and within the said Manor or Lordship and Town of *Selby*; and that they the said *Robert Myers* and *John Bradley* have respectively, from time to time and at divers times since the Month of *April* 1813, crushed, or caused to be crushed, at or by their own Mills in the said Manor or Lordship and Town, considerable quantities of Malt; but Defendants, *Robert Myers* and *John Bradley*, deny that they have at any time since the Month of *April* 1813, ground, or caused to be ground, at or by their own Mills in the said Manor or Lordship and Town, or at or by any other Mills or Mill, considerable quantities, or any quantity of Malt. And Defendants, *Robert Myers, John Capes* and *John Bradley*, to the best of their knowledge and belief, say, and Defendant, *Susanna Walker*, believes, that the said *Robert Myers* hath, since the Month of *April* 1813, down to the filing of the said Bill, crushed or caused to be crushed, at or by his own Mill in the said Manor or Lordship and Town, 875 Quarters of Malt, or thereabouts; and that the said *John Bradley* hath, since the Month of *April* 1813, down to the filing of the said Bill, crushed or caused to be crushed, at or by his own Mill, in the said Manor or Lordship and Town, 312 Quarters of Malt, or thereabouts; and that the said *John Capes* hath, since the Month of *April* 1813, down to the filing of the said Bill, ground or caused to be ground, at or by his own Mill in the said Manor or Lordship and Town, fifty-two Quarters, or thereabouts. And that the said Malt was so crushed and ground in order that such Malt might be, and the same was accordingly, manufactured into Ale, Beer, or other

Malt Liquor; and that the principal part of such Malt Liquor was sold to divers persons, and that a small part only thereof was spent and consumed by them in their Dwelling-Houses within the said Manor or Lordship and Town. And that the value of the several quantities of Malt so crushed by the Defendant, *Robert Myers*, amounted to the sum of 3,718 *l.* 15 *s.* or thereabouts, and by the Defendant, *John Bradley*, amounted to the sum of 1,326 *l.* or thereabouts; and of the said Malt so ground by the Defendant *John Capes*, amounted to the sum of 221 *l.* or thereabouts; and that the value of the quantity of Malt made into Malt Liquor, and actually used and consumed by the said *Robert Myers* in his Dwelling-House, amounted to the sum of 170 *l.* or thereabouts; and the quantity of Malt made into Malt Liquor, and actually used and consumed by the said *John Capes*, in his Dwelling-House, amounted to the sum of 22 *l.* 6 *s.* 3 *d.* or thereabouts; and that the quantity of Malt made into Malt Liquor, and actually used and consumed by the said *John Bradley*, in his Dwelling-House, amounted to the sum of 45 *l.* 3 *s.* 1 $\frac{1}{2}$ *d.* or thereabouts. And Defendants, *Robert Myers*, *John Capes* and *John Bradley* deny that they have respectively so done and acted for the purpose and with the view in the said Bill mentioned:—Say, they have respectively so done and acted for the purpose and with the view of turning their Malt to a more beneficial account than if the same had been ground, and conceiving that they were at liberty to do as they thought fit; and that the same Malt so crushed by the said *Robert Myers* and *John Bradley*, was so crushed at Mills purchased by them of and with the privity and knowledge of *Thomas Foster*, in or about the year 1812, then a renter of the said Plaintiffs said Mills.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Say, they admit that the said *Susanna Walker* hath ever since the year 1812 been, and still is, a Resiant and Inhabitant of and within the said Manor or Lordship and Town of *Selby*; and Defendant, *Susanna Walker*, to the best of her knowledge and belief, saith, and Defendants, *Robert Myers*, *John Capes*, and *John Bradley*, believe, that she the said *Susannah Walker* hath, from time to time, since the Month of *April* 1813, offered and exposed to sale, and sold, at or in her Shop or Dwelling-House within the said Manor or Lordship and Town of *Selby*, to divers or some others of the Resiants or Inhabitants of or within the said Manor or Lordship and Town, to be spent and consumed in their respective Houses and Dwellings within such Manor or Lordship and Town, great quantities; viz. about eighty stone per week, of Meal and Flour, partly manufactured and baked into bread, and partly unmanufactured, being the produce of or obtained from Corn or Grain not ground at the said Mills of the said Plaintiffs, or either of such Mills.

Say, they are advised, and hope to be able to prove, that the said Plaintiffs, *John Richardson* and *William Massey*, have not by such means as in the said Bill mentioned, been defrauded of the Toll or Mulcture which would have accrued or become payable or due to them in case such Corn had been ground at the said Mills of the said Plaintiffs.

Say, that to the best of their knowledge and belief, the value or amount of the Toll or Mulcture, in case the whole of the Malt manufactured by Defendants, *Robert Myers*, *John Capes* and *John Bradley*, had been ground at the said Plaintiffs Mills since *April* 1813 to

the filing of the said Bill, would have amounted to the sum of *l.* or thereabouts, and that the value of the Meal or Flour sold by Defendant, *Susanna Walker*, and manufactured by her into bread, and sold by her to the Resiants or Inhabitants of or within the said Manor or Lordship and Town of *Selby*, to be consumed in their Dwelling-Houses within the said Manor or Lordship and Town, between *April* 1813, and to the filing of the said Bill, amounted to the sum of *l.* or thereabouts:—Admit, that the Plaintiffs, *John Richardson* and *William Massey*, have by themselves, or their Agents, applied to these Defendants, *Robert Myers*, *John Bradley* and *Susanna Walker*, respectively, for such respective purposes, or made such requests to them in the said Bill mentioned; and they have refused, and do refuse, to comply therewith, because they are advised that no such custom as is alleged by the said Bill hath ever obtained, or that if the same hath ever obtained, it related solely to such Corn, Grain and Malt only, as was grown within the said Manor or Lordship of *Selby*, and was taken or sent by the Tenants, Resiants or Inhabitants of and within the said Manor or Lordship and Town of *Selby*, to be ground; and that such Custom, if it ever obtained, did not extend to Malt which is crushed and not ground, nor to Flour purchased by or sold to the Tenants, Resiants and Inhabitants of and within the Manor or Lordship and Town of *Selby*. And also, because, if such Custom ever obtained, it hath now ceased, by reason of the same Tenants, Resiants or Inhabitants, not having used the said Plaintiffs Mills for a long series of years, and by reason of such non-usage of such Mills having been acquiesced in by the Owners and Occupiers of the said Plaintiffs said Mills, and

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

because the said Plaintiffs have sold and disposed of the streams of water heretofore used for turning the said Mills, and have permitted the same streams of water to be diverted and taken away from the said Mills, and have thereby destroyed the said Water-Mills; and because they have converted such Water-Mill into a Steam-Mill or a Windmill, and because they have removed and destroyed the said Horse-Mill:—Say, they admit, that the immemorial usage and custom in the said Bill mentioned hath been at different periods recognized, confirmed and established to a limited extent, and to the extent mentioned in the decrees hereinafter mentioned, but not to the extent in the said Bill mentioned, by Decrees made by or in His Majesty's Court of Exchequer at *Westminster*, in certain Suits instituted in such Court. But these Defendants are advised, and hope to be able to prove, that the same usage and custom hath been improperly, and without a full consideration being had of all the circumstances, recognized, confirmed and established by such Decrees.

Say they admit, that in *Hilary Term*, in the 3d of the reign of his late Majesty King *Charles the First*, a Suit was instituted in the said Court of Exchequer at *Westminster*, by *Thomas Walmsley*, and others, in person, against *Robert Marshall* and others, the Tenants, Residents and Inhabitants of and within the said Manor or Lordship and Town of *Selby*, and that the said *Thomas Walmsley*, was the then Owner of the said Manor or Lordship of *Selby*, and of the said Mills which have been so taken away or altered as aforesaid, and that the other Plaintiffs in such Suit were Lessees or Tenants of such Mills. And that the Decree made in such Suit was of or to the purport or effect in the said Bill men-

tioned; and that in *Hilary Term* in the year 1726, another Suit was instituted in the said Court of Exchequer, by or in the name of *Catherine Lady Petre*, and certain other persons, against *William Clarkson* and others, then Tenants Resiants and Inhabitants of and within the said Manor or Lordship and Town of *Selby*, for the purpose in the said Bill mentioned. And that the said *Catherine Lady Petre* was the then Owner of the said Manor or Lordship of *Selby*, of the aforesaid Mills so taken away or altered as aforesaid. And that the said other Plaintiffs in such Suit were the then Lessees or Tenants of such Mills, and that in the Decree made in such last-mentioned Suit, it was declared, ordered and decreed to the purport or effect in the said Bill mentioned.

Upon the Pleadings being opened, the *Vice-Chancellor* expressed a doubt, whether a Court of Equity had Jurisdiction in this Case, or whether the Remedy was not at Law; and desired the Counsel for the present to confine their Argument to the Question of Jurisdiction.

Mr. *Bell* and Mr. *Barber*, for the Plaintiffs:—

The Jurisdiction is established by many Cases; and on the Principle of preventing a multiplicity of suits. In an early Case, *Currier v. Cryer* (a), the Jurisdiction was exercised. In the present Case, the Custom has been established by two former Decrees, one in *Marshall v. Walmesley* (b), and another in *Lady Petre v.*

(a) Hardr. 21.

(b) *Walmesly v. Marshall*.

Decree.—*Hilary Term*,
3d Cha. I.

"Whereas *Thomas Walnesley*,
Esquire, *Thomas Morrett*, Tho-

mas Knight, and *Robert Waude*,
did exhibite theire *Englishe*
Bill into this Court againste
Robert Marshall, *John Hesle-*
tyne, *Peter Storye*, *Christopher*
Ketlewell, and *Bridget Hesle-*

1819.

Duke of
NORFOLK
and others,
v.

R. MYERS
and others.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Clarkson and others; and such Decrees may be enforced either by *Scire facias*, or by a Supplemental Bill.

tyne, and *Thomas Nicholls*, Tents and Inhabitants of and within the Manor of *Selbye*, in the Countie of *York*; Shewing thereby amongst other things, that whereas the said *Thomas Walmesly* was and is seised in his Demeasne, as of free or free-taile of and in the Manor or Lordshippe of *Selbye* aforesaid, in the said Countie of *York*, wherein he the said *Thomas Walmesly* hath many freeholders, Copyholders, and other Tenants, and of and in a Court Baron and Courte Leete, and of divers and sundrie liberties, Roalties, and Jurisdictions to the same belonging and appertayneing, and also of and in twoe antient *Water Corne Mills*, called *Selbye Mylnes*, and of an antient *Horse Mylne* standing and being in *Selbye* aforesaid, and of and in all the Soke, Soken, Suite, Griste, Mulcture, and Tolle to the same belonging; for which said Mannor and Premises he the said *Thomas Walmesly* payeth the yearly free-farm Rent of fower score and fower Pounds five Shillings and fower Pence, to the King's Maie, into the Receipt of his Highnes Ex-

chequer at Westminster; and that the Soken and Profit of the said Mylne is a great part of the Profit out of which the said free-farm Rent is reserved and paid, and without which, he the said *Thomas Walmesly* cannot well pay the said free-farme; and that by antient Custome, time out of mynde of Man, used within the said Manor, and within the Town of *Selbye* aforesaid, being an antient Towne tyme out of mind of Man, all and singular the Tenants, Inhabitants, Resiants, and Dwellers within the said Manor, Lordshippe, and Towne of *Selbye*, for all the time whereof the Memory of Man is not to the contrary, have used and been accustomed to grinde all their Corne and Graine, as well growinge within the said Manor, as brought from other Places, and spent in their Houses there, at the said Mylnes, paying Tolle and Mulcture for the same, according to an antiente Rate, Custome, and Usage, within the said Manor or Lordshippe, time out of Minde of Man, used and accustomed; and that none of the Inhabitants, Tenants, or

That was laid down in the Case of the *Manchester Mills*, mentioned in the Note to *Cole v. Berbeck* (c).

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Resiants, within the said Manor, Lordshippe, or Towne, have, at any time during all the said time, used, or been suffered to grinde their Corne, Graine, or Greist, at any other Mylnes, nor to suffer to be carried or recarried, any Corne or Graine, or Mault, to anie other Mylnes, but only to the said Mylnes so belonging to the said *Thomas Walmesly*, in *Selbye* aforesaid, neither within all the said tyme have anie Loaders or Carriers used, or bene suffered or allowed to come within the said Mannor or Towne, to carry or recarry any of the said Corne, Graine, or Mault; and that the said *Thomas Walmesly*, and those whose Estate he hath in the said Manor and Mylnes, have allways had special care, that the Tenants, Inhabitants, and Resiants within the said Mannor, Lordshippe and Towne, should be well used, without exactinge any unreasonable Tolle, and without making them staye any long time for grindinge their Corne, Graine, or Mault; and that the said Mylnes have bene and are sufficient to grinde all the Corne, Graine, or Mault

of all the said Tenants, Inhabitants, and Resiants, within the said Manor, Lordshippe, and Town, so that they neither needed, nor ought to carry or send their Corne, Graine, or Mault to any other Mylne or Mylnes whatsoever, to be ground; and the said *Thomas Walmesly* being so seised thereof as aforesaid, demised the said Mylnes, with all Suite, Soken, Grist, and Mulcture to the same belonging and apperteyneing, to the said *Robert Marshall*, and *Peter Storyc*, and their Assignes, for certaine years yet to come, under a certaine yearly Rent, paialbe to the said *Thomas Walmesly*; and afterwards the said *Robert Marshall* and *Peter Storyc* did assign, and set over all their Interest in the said Mylnes and Premises, with the Appurtenances, to the said *Thomas Morrett*, *Thomas Knight*, and *Robert Waud*: By force whereof, they the said *Thomas Morrett*, *Thomas Knight*, and *Robert Waud*, were and ought to be possessed of the said Mills, with all the Suite, Soken, Grist, and Mulcture, to the same

(c) Dougl. 209.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

When a Custom is established, the Court will enforce it on a Bill filed against others who were not Parties

belonging, for divers years yet induring; but the said Defendants being Tenants or Freeholders of the said Manor of *Selbye*, and Dwellers and Inhabitants within the said Town of *Selbye*, little respecting the said antient Custom and Usage of grinding their Corne, Graine, and Mault at the said antient Milnes at *Selbye* aforesaid; and having combined themselves together to withdraw the said Suit and Soken from the said Mylnes of *Selbye*, and utterlie to overthrowe the same if they can, or greatly to decaye the benefit thereof, they the said *Robert Marshall*, *Peter Storje*, and *John Hesletyne*, have of late erected, taken to farm, or otherwise, got into their possession, several Wind Milnes and Horse Milnes near adjoining to the said Town of *Selbye*, with intent to grinde the Corne, Graine, and Mault of the saide Tenants and Inhabitants, the same Milnes beinge newly erected in Places were never anie Milne or Mylnes stood before, to the great prejudice of the said Complainants: and to that end, they have not only sent, and doe daily continue to

send for, fetch and carry, and re-carrie the Corne, Graine, and Mault of the said Tenants and Inhabitants from their Houses to the said newe erected Mylnes, and their have ground the same, or caused the same to be ground, but alsoe doe practice to drawe the said Tenants and Inhabitants to the said newe erected Mylnes, their to grinde their owne Corne, Graine, and Mault, as by the said Bill more at large appeareth. To which Bill, the said *Robert Marshall*, *John Hesletyne*, *Peter Storje*, *Christopher Ketlewell*, and *Bridget Hesletyne*, five of the said Defendants, put in their answers, and do confesse, that the said *Thomas Wakmesly* is seised of the said Manor and Milnes of *Selbye*; and that the said other Complainants have a Lease of the said Mylnes, as in the said Bill is set forth; and the said *Robert Marshall* and *John Hesletyne* doe say, that they were possessed of a *Wind Mylne* and a *Horse Mylne* in *Brayton*, in the said Countie of *York*, within the said Manor of *Selbye*, which are antient Mylnes, and have been used for grindinge of Corne and

to the Bill establishing the Custom. There would be little use in a Bill to establish a Custom, if another

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Graine, tyme out of mind of Man, as they think, and the same are holden of the said *Thomas Walmesly*, as of his said Mannor of *Selbye*, as the said Defendants think, by a certain free Rent and Suite of Court. And they confess, that they have, by their Servants, fetched Corne and Grist from *Selbye* to the said Mylnes in *Brayton*, and have ground their own Corne there; for they say that the Town of *Selbye* is a great and populous Towne, and that the Complainants said Mylnes are not sufficient or able to grinde all the Corne of the Tenants, Inhabitants, and Dwellers in the said Town to be spent in their Houses, for that they want sufficient Water a greate part of the *Summer*, and do usuallie stand in lack of Water a great part of the Winter tyme, and so are not sufficient to grinde the one half of the Corne usuallie spent in the said Town. And all the said Defendants doe denie, that to their knowledge, all and singular Tenants, Resiants, Inhabitants and Dwellers, within the said Manor, Lordshippe, and Towne of *Selbye*, for all the time whereof the

Memory of Man is not to the contrarie, have used and bene accustomed to grinde all their Corne and Graine, as well growinge within the said Mannor or Lordshippe of *Selbye*, as brought from other Places, and spent in their Houses there, at the said Mylnes of the Complainants onely as in the Bill of Complaint is alleged. For they saye, that all and every the Inhabitants, Tenants, and Dwellers in the said Town of *Selbye*, tyme whereof the Memory of Man is not to the contrary, have used to grind their Corne, Graine, and Grist, at such Milnes as they pleased, and as well at the Milnes of the Persons as at the Milnes of the said Complainants; and that by all the tyme aforesaid, Loaders and Carryers have used and bene suffered and allowed to come within the said Mannor, Lordshippe, or Towne of *Selbye*, to carry away Corne, Graine, or Mault to be ground at any other Mylnes, and to be spent in any Houses of the said Tenants, Inhabitants; and Dwellers in the said Town of *Selbye*, as by the said Answers, amongst

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Bill could not afterwards be filed against Persons who have subsequently acted in Breach of the Custom. Nor

other things more at large, appeareth: whereunto the said Plaintiffs replied, maintayneing their said Bill in all points to be true and sufficient, and denying, and traversinge all the material points of the said Defendant's Answers. And the said Defendants thereunto rejoyned, and Witnesses were examined on both sides, and their Depositions published, and the Cause appointed to be heard this Day. Now, upon full openinge and debatinge of the said Cause, by the Counsel of both sides, and upon readinge of the Depositions of divers Witnesses examined in the said Cause, and upon deliberate heatinge thereof by the Courte, for that the said Complainants have fully proved the Custome alleaged by them in the said Bill, and for that the Defendants have proved no Matter materiall to disapprove or avoyd the same: It is, therefore, this day ordered and decreed by the Right Honorable *James* Earl of *Marlburgh*, Lord Treasurer of *England*, *Sir John Walter*, Knt. Lord Chief Baron of the Exchequer, and the rest of the Barons of the same Court, that the said

Defendants, and all other the Tenants, Inhabitants, Resiants and Dwellers, within the said Mannor, Lordshippe and Town, of *Selbye*, that now be, and that hereafter shall be, at all times hereafter, shall grinde all their and every of their Corne, Graine, and Mault to be spent in their and every of their Houses in the said Mannor, Lordshippe and Town of *Selbye* aforesaid, at the said Complainant's twoe Water Corne Milnes, called *Selbye* Milnes, and at the said Complainant's said Horse Milne in *Selbye* aforesaid; and that neither of the said Defendants, nor any other of Tenants, Resiants or Inhabitants of the said Mannor, Lordshippe, or Town of *Selbye* aforesaid, shall directly or indirectly carrie or send, or caused to be carried or sent their or any of their Corne, Graine, or Mault to be spent in any of their House or Houses in *Selbye* aforesaid, to be ground at any other Milne or Milnes whatsoever, savinge at the said Complainant's Milnes aforesaid, or some or one of them, and that now Loaders or Carriers, or other Person or Persons whatsoever,

CASES IN CHANCERY.

111

is it any objection to this Bill, that it is for an Account, when only the Defendants can be accounting Parties; such Bills, in Cases like the present, having been frequently sustained. In *Milbourn v. Fisher* (d), a Bill was filed by the *Deputy Meters* at *Billingsgate*, for an Allowance claimed for Metage, &c. and an Account and Payment of the Arrears was decreed. In *Neville v. Buck* (e), and in several other Cases, not establishing Bills, the Decrees in which your *Honor* will be furnished with, the same Relief has been granted as is here prayed. It is impossible to ascertain, unless by the Answer of the Defendants, what Toll is due; and a

1819.

Duke of
NORFOLK
and others,
v.

R. MYERS
and others.

shall fetch or carrie any Corne, Graine, or Mault of any of the Tenants, Inhabitants, or Resiants, within the said Mannor, Lordshippe, or Town of *Selbye* aforesaid, to anie other Milne or Milnes whatsoever, saving to the Complainants said Milnes, to be ground for the said Tenants, Inhabitants, and Resiants, or any of them, to be spent in theire or anie of theire House or Houses in *Selbye* aforesaid: Provided always, that if any Corne, Graine, or Mault of the said Tenants, Inhabitants, or Resiants of the said Mannor, Lordshippe, or Town of *Selbye* aforesaid, or of any of them, shall be brought or sent to the said Complainant's Milnes aforementioned, or any of them, to be there ground without

fraud or covine, and shall there lye and remain unground by the space of fower and twentie hours; that then in every such Case, it shall and may be lawfull to and for the Owner or Owners of such Corne, Graine, or Mault, as shall soe lye and remain unground, or his or their Servant or Servants, to take and carrie away, or cause to be taken and carried away, the same Corne, Graine or Mault, so remaining as aforesaid, to be ground at anie other Milne or Milnes, where he or they, or any of them, shall think fitt anie thing in this Decree contrarie notwithstanding.

(d) Mentioned in Note to *Lewis v. Sutton*, 5 Ves. 685.

(e) 7 Bro. P. C. Toul. Edition.

1819.

Duke of
NORFOLK
and others,
v.

R. MYERS
and others.

discovery being necessary, the Court will give Relief, and not send the Party to Law. In the case of *Toll-Thorough*, an Account will be decreed here, though such Tolls are recoverable in *indebitatus assumpsit* at Law (f).

Mr. Wetherell, Mr. Heald, and Mr. Pepys, for the Defendants, *John Capes*, and *Susannah* and *William Walker* :—

There is no Authority that such a Bill as this can be sustained. It is an Action upon the Case, in the form of a Bill in Equity, for an Account. A Bill will lie to establish a Custom, and for an Account in respect of Breaches of the same; but when the Custom is once established, the Remedy, if any, is at Law. At Law, the Decree establishing the Custom would be Evidence of the Custom. This Bill is founded on a Custom already established in another Suit; it is clear, therefore, it is not a Bill to establish the Custom. In *Millbourn v. Fisher*, the Bill was to establish a Custom. Such too appears to have been the principal object of the *Manchester Mills* Case. What is there said of a *Scire Facias*, or a *Supplemental Bill*, can apply only, as between the same Parties, or their Representatives. A *Scire Facias* or *Supplemental Bill* would not lie against new Parties. These Defendants were not Parties to the Bill on which the Custom, in this Case, is said to be established. The Plaintiff does not state that any Toll is due, but that the Defendants have prevented Toll becoming due. In *Lewis v. Sutton* (g), Lord Rosslyn held, that unless the Plaintiff could maintain an Action

(f) *Corporation of Carlisle v. Wilson*, 13 Ves. 277. (g) 5 Ves. 683.

for Money had and received against the Sheriff, he could not decree an Account. He said, it was only Damages for the Violation of Franchise. It is Damages they seek by this Bill. In the *Worcester* (h) and *Tewkesbury* Cases (i), similar to this, no Relief was attempted to be obtained in Equity, but the Parties went to Law. It was understood in those Cases, that no Relief could be had, except at Law. In all the Cases, it will probably be found, that where Relief was given, the Bill was filed to establish the Right, and not for an Account in respect of a Right already established. If this Bill can be sustained, the consequence will be an infinity of such Cases.

1819.
Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

The VICE-CHANCELLOR [after stating the Substance of the Pleadings] :— 11th February.

In this Case, it has been urged, as a preliminary Objection, that the Plaintiffs ought to have sought Relief at Law, and not in this Court. It has been contended, that although this Court will entertain a Bill to establish a Custom, and for an account of Toll due in respect of such Custom, it will not, where the Custom has before been established in another Suit, permit a Bill for an account of Toll due, but will remit the Plaintiff to his legal Remedy ; and that Position is certainly countenanced by the Proceedings at Law in the *Tewkesbury* and *Worcester* Cases, alluded to by Mr. *Pepys*, in the Argument, where the Parties seemed to have proceeded at Law, not by choice, but because it was conceived no remedy could have been obtained

(h) 2 Taunt. 139; 5 Taunt. (i) 6 East, 462.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

in Equity. But, how do the Authorities stand? From various Decrees with which I have been furnished, it appears, that where a Custom has, on a Bill filed, been established, this Court will nevertheless entertain a subsequent Bill for an Account founded on the Custom so established in another previous Suit. This appears in the Case of the Earl of *Warrington* and others v. Sir *Oswald Mosely*, Bart. in the Duchy Court of *Lancaster*, 22d *February*, 1733. This was the Case of the Manchester Mills, alluded to in *Douglas (k)*. In that case, there was an evasion of the Custom, and an issue as to the Custom was directed, and the Custom being established at Law, relief was given. The Bill there stated that four successive Bills had, at different periods, been filed for Relief in respect of Breaches of the Custom established by the first Bill. On one of the Bills there noticed, where the Defendant had erected a Horse Mill, thereby withdrawing the Mulcture from the customary Mill, it was decreed that the Horse Mill should be *pulled down*, which certainly carried to the full extent the principle, that this Court would protect the right under the Custom which it had once established (*l*).

(*k*) p. 211, n. 13.

(*l*) In *Green v. Robinson* and another, *Hardres*, 194, the object of the Bill was to have a Mill demolished, situate out of the Manor, but injurious to the Lord's Mill, at which all the Tenants and Resiants within the Manor were, by Custom, to grind all

Corn and Grain baked and brewed in their Houses, upon which, the Court held, "that it was lawful for any Tenant to set up a Mill upon his own Ground out of the Manor, but if the Owner or Tenant of such a Mill, out of the Manor, cause or persuade any of the Tenants or Resiants within the Manor

Lady *Petre v. Clarkson*, in the Exchequer, 26th October 1730, is an instance of a similar Bill filed, where, on a former Bill, the Custom had been established. So, in *Pilkington v. Webster*, in the *Duchy Court of Lancaster*, 17th June 1761, the Court entertained Jurisdiction, and gave relief in respect of a Breach of the Custom there stated, as to the grinding of Corn, &c. at the customary Mill, although, as it appeared on the face of the Bill, the Custom had been established on a Bill previously filed. In that Case also, Mills, Querns, and Engines, erected, set up, and used for the purpose of grinding Corn, Grain, or Malt, were directed to be destroyed or abated. The Court there proceeded upon the same principle as in the *Manchester Mills Case*.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

There is also the Case of *Neville and others v. Buck and others*, in the *Duchy Court of Lancaster*, 30th April 1801. In that Case, as in the others, there had been a previous Decree establishing the Custom. Relief was given on that Bill, and the Decree affirmed, on Appeal to the *House of Lords*. There is, therefore, a current of Decisions, clearly showing, that although a Custom has been previously established, the Court will decree an Account against other Persons acting afterwards in breach of the Custom, and supporting the jurisdiction of the Court to entertain this Bill.

to grind there, or fetch any Grist out of the Manor to his own Mill; that, in that Case, he may be prohibited by a Decree of this Court; but that they could not decree any Mill to be destroyed, unless erected within the King's Manor, to the prejudice of the King's Mill."

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Mr. Wetherell, and Mr. Pepys:—

Though the Court has determined that it has Jurisdiction in this Case, there are other Objections to the Bill; one is, that the Custom established by the Decree in *Walmesley v. Marshall*, is much narrower than that stated in this Bill. The Custom established by the Decree in that Case, was, “that the Tenants, Resiants, and Dwellers, within the Manor, Lordship, and Town of *Selby*, should grind all their and every of their Corn, Grain, and Malt, to be spent in their and every of their Houses in the said Lordship or Town of *Selby*, at the two Water Corn Mills, called *Selby Mills*, and at the Horse Mill in *Selby*; and that neither the Tenants, Resiants, or Inhabitants of the said Manor, Lordship, or Town of *Selby*, should directly or indirectly carry or send, or cause to be carried or sent, their Corn, Grain, or Malt, to be spent in their or any of their House or Houses in *Selby* aforesaid, to be ground at any other Mill or Mills.” That is the Custom established; but the Bill in this Case states the Custom to be for the Tenants, &c. not only to grind at the Mills all the Corn, Grain, and Malt, which they expend and consume in a ground state, in their respective Dwelling Houses within the Manor, but goes on farther, and says, “and which they, or any of them, have or hath sold or exposed to sale, or do, or doth sell or expose to sale, in a ground state, within such Manor, &c. to any other of the Tenants, &c. within the Manor, to be used, spent, or consumed, in their respective Dwelling Houses within such Manor, whether grown or produced within the said Manor, &c. or brought thither from any other places.” The Custom established by the former Decree, was only as to Corn, &c. in a grindable State; but the

Custom, as stated in this Bill, extends also to Corn ground. Another Objection is, that the two old Corn Mills, and the Horse Mill, are taken down, and a Steam Mill erected in their stead; and by this Alteration, we contend, the Custom is destroyed. A third Objection is, that some of the Defendants are charged with crushing Malt, and not with grinding it, and we contend, that crushing is not an offence against the Custom.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

Mr. Bell:—

I have searched, but have not been able to find any Decision, that by the Erection of a new and different kind of Mill, the Custom is destroyed.

The VICE-CHANCELLOR:—

The Custom is not formally stated in the Bill. But it was decided, in the Case of *Cole v. Birbeck (m)*, that a Custom to grind at an ancient Mill all Corn spent within the district, is, in legal effect, a Custom to consume no Corn within the district not ground at the ancient Mill. It should therefore have been stated, that the selling of Corn ground was illegal, and a breach of the Custom, though not in terms excluded by the Custom; but it would be too much to turn the Parties round upon this informality. In *Pilkington v. Webster*, and *Neville v. Buck*, the Court acted upon the doctrine of *Cole v. Birbeck*. I am concluded, therefore, by the Decree in *Walmsley v. Marshall*, from admitting Evidence to show that Meal can be purchased and

^m (m) Dougl. 209.

1819.

Duke of
NORFOLK
and others,
v.
R. MYERS
and others.

spent by the Tenants, which was not ground at the Plaintiffs Mills.

The Question, whether the Custom is destroyed by the conversion of the Old Water Mills and Horse Mill into a Steam Mill is merely of Law; and so is the Question, whether crushing Malt is not within the Custom of grinding; and as the Parties must go to Law, the better course is to leave the whole Case open, and to retain the Bill, with liberty to the Plaintiffs to bring such Action or Actions as they may be advised.

Between DANIEL MIALL, PAUL WOOD JONES
SHADRACK HONEYMAN, JOHN PORTER,
JOHN BAILEY AND JOHN HAYWARD,
Executors and Trustees of JOHN BROWN,
deceased - - - - - Plaintiffs;

And

MARY ANN BRAIN, Widow; SALLY HOPKINS,
Widow; SOPHIA BRAIN, Spinster; and WIL-
LIAM BURGESS, and MATILDA his Wife;
and GEORGE BUTLER and MARY his
Wife - - - - - Defendants.

1819.

20th February.

THE question in this Cause was, whether the Tes-
tator's Widow was entitled to Dower, and also to the
Provision made for her by the Testator's Will, or,
whether she must be put to an Election.

*Devise of
Real and Per-
sonal Estate to
Trustees, in
Trust, as to a
certain Freehold*

Message, for Testator's Wife for Life, if she should so long continue his Widow, and the Trustees to furnish the same, and his Plate, Linen, &c. for her absolute use and benefit; and out of the Rents, Income, and annual Profits of his, Testator's, real and personal Estate, to pay her an Annuity of 100 l. for her Life; and in case she should be enseint with any Child, a further Annuity of 50 l. during the minority of such Child, for its Maintenance; and if the Child should be a Son, and attain twenty-one, he gave a certain Farm to him and his Heirs, subject to the Annuity of 100 l. which was thereafter to be an exclusive Charge upon such Farm. If the Child proved to be a Daughter, she to have an Annuity of 100 l. for her Life, and after her decease, 2,000 l. to be raised and paid to her Children; and upon further Trust, to pay to his Daughter N. V. an Annuity of 100 l. for her Life, and to permit her to use, occupy and enjoy a certain Messuage for her Life; and after her decease, to raise 2,000 l. for her Children; and after giving Legacies to his other Children, the Testator gave the Residue of his real and personal Estate amongst his Children, and gave the usual Power of Sale to his Trustees. Held, that the Wife claiming Dower, must be put to an Election.

1819.

D. MIALl
and others

v.

M. A. BRAIN
and others.

John Brain, by his Will, after directing that all his Debts, testamentary and funeral Expenses, should be paid, devised unto his Daughter *Nancy Veal*, and seven others, persons named in his Will, their Heirs, Executors, Administrators and Assigns, all his Freehold Messuages, Lands, Tenements and Hereditaments in the Parish of *Portsea*, and all other his real Estate, whatsoever and wheresoever, with the Appurtenances; and also all his Goods, Chattels, Money, Securities for Money, Effects and Personal Estate, of what nature or kind soever, to hold the same unto and to the use of the said *N. V.*, and the seven other persons named the Will, their Heirs, Executors, Administrators and Assigns (according to the several natures and qualities of the same Premises respectively), upon Trust, as to Freehold Messuages and Hereditaments in *Brunswick Row*, in *Portsea* aforesaid, for his Wife *Mary-Ann Brain*, during her Life (if she should so long continue his Widow) and out of his Personal Estate to furnish the same Messuage with such Furniture as his Trustees should in their discretion think proper, together with his plate, linen and china, for the absolute use of his said Wife; and upon further Trust, out of the rents, profits, and annual Income of his real and personal Estate, to pay unto his Wife an Annuity of one hundred pounds for her Life (if she should so long continue his Widow); and in case she should be *ensient* with any Child at the time of his decease, then upon Trust to pay her a further Annuity of fifty pounds during the minority of such Child, to be applied for his or her maintenance and education; and in case the same Child should be a Son, and should live to attain the age of twenty-one years, then from that period as to and concerning his Messuages, Farm, Lands and Hereditaments

in the Parish of *Portsea* aforesaid, in the occupation of Mr. *Green*, and his Daughter the said *Nancy Veal*, upon Trust for such Son, his Heirs and Assigns for ever, (subject nevertheless to the payment of the said Annuity or yearly Sum of 100*l.* to be paid to his Wife during her widowhood as aforesaid, which should thenceforth be charged exclusively upon the same Premises); but in case such Child should be a Daughter, then, upon Trust, to pay to her one clear Annuity of 100*l.* for her Life, and after her decease, to raise the Sum of 2000*l.* and pay the same unto and amongst all and every her Child and Children, when and as they severally should attain their respective ages of twenty-one years, in equal shares and proportions as Tenants in common: And upon further Trust, to pay unto his Daughter *Nancy Veal* an Annuity of 100*l.* for her Life; and also to permit and suffer her to use, occupy and enjoy his Freehold Messuage, Garden and Hereditaments at *Buckland*, in the Parish of *Portsea* aforesaid, for her Life, and from and after her decease, upon Trust, to raise the sum of 2,000*l.* and pay the same unto and amongst all and every the Child and Children of his said Daughter *Nancy*, when they should respectively attain the age of twenty-one years, in equal shares and proportions as Tenants in common. And after giving some other Legacies, the Will proceeded thus:—"And as to and concerning all the rest, residue and remainder of my real and personal Estate whatsoever and where-soever, and also as to such part and parts whereof no absolute disposition is heretofore made (subject and without prejudice to the Trusts hereinafter declared thereof, according to the several natures and qualities thereof) upon Trust, for and for the benefit of any

1819.

D. MIALL
and others
v.
M. A. BRAIN
and others.

1819.

D. MIALL
and others,
v.

M. A. BRAIN
and others.

Child that my said Wife may be *ensient* with at the time of my decease, and of my said five Daughters the said *Nancy Veal, Sally Hopkins, Sophia Brain, Mary Best, and Matilda Burgess*, their Heirs, Executors, Administrators and Assigns, to be equally divided between them as Tenants in Common." The Testator then empowered his Trustees to sell his Freehold Messuages, Farms and Hereditaments and all other his real Estate, and also his said personal Estate and Effects; and to collect the Monies due to him at his death, and to lay out and invest the same, and also all the Monies which should be raised by the sale of his said Trust Estates, at Interest, in or upon any of the Government or Parliamentary Stocks or Funds of *Great Britain*, or upon real Securities in *England* or *Wales*; and authorized them to change and vary the Stocks, Funds and Securities in or upon which the same or any part thereof should be invested, and to stand and be possessed of the same Monies, Stocks, Funds and Securities, upon the Trusts, and for the ends, intents, and purposes before declared concerning his said Estates and Effects, and directed that the several Annuities given by his Will should be paid half-yearly, together with a proportionate part of the same, up to the time of the determination thereof respectively.

Mr. *Hart* for the Plaintiffs, the Executors and Trustees.

Mr. *Bell*, Mr. *Wetherell* and Mr. *Shadwell*, for the Defendant, the Widow:—

This is not a Case in which the Widow ought to be put to her Election. For that purpose it must be clear

that the provision made for her by her Husband's Will was meant in satisfaction of her right to Dower; the giving of the House, of an Annuity to the Wife, out of the residue of his Estate, is not of itself sufficient to bar her claim to Dower; *French v. Davis (m)*, *Greatorer v. Cary (n)*, *Strahan v. Sutton (o)*. To disappoint her legal Claim, the Provision in the Will must be inconsistent with the Claim of Dower. It must appear there is a repugnancy; *Greatorer* and *Cary* is in point. Here the Annuity is given out of the general Estate, both real and personal, which forms a stronger Case in favour of Dower.

1819.
D. MIALL
and others,
v.
M. A. BRAIN
and others.

Though the Plaintiff could not insist on her Thirds of the House devised to the Daughter, as that would be inconsistent with the Daughters use of the House (supposing, under the terms of the gift, she were bound to live in it, and could not let it) still the Sheriff in assigning Dower might take the House into consideration, for he is not bound to assign a third part of each individual part of the real Estate. If there be Parceners of two Manors, on a Writ of Partition, each Manor is not necessarily divided, but the Sheriff may assign one Manor to one Parcener, and the other Manor to the other. So, there is no Case where it is laid down that a Doweress is entitled to a third of every particular part of the Estate; but it is in the discretion of the Sheriff what part of the Estate he will assign. It cannot therefore be said that the Bequest of the House was inconsistent with the claim of Dower. But, supposing the Devise of the House to the Daughter,

(m) 2 Ves. p. 572.

(o) 3 Ves. 249.

(n) 6 Ves. 615.

1819.

D. MIALL
and others,
v.
M. A. BRAIN
and others.

be inconsistent with a claim of Dower out of the House, that only disappoints the claim *pro tanto* and does not prevent the claim of Dower as to the rest of the Estate. It may show an intention that she should not claim Dower as to the House, but no intention that she should not claim Dower out of the rest of the Estate. In *Birmingham v. Kirwan* (p), Lord *Redesdale* held, that a Wife was entitled to a House and Land devised to her by her Husband, paying a trifling rent, and might yet claim Dower out of the residue of his Estate, which he had devised to others. In that Case the legal Estate was in Trustees. So, in *Lord Dorchester v. Effingham* (q), a Widow was held not to be put to her Election by a Devise to her for Life in a Mansion House and fifty Acres held with it, being part of the same Estate out of which she claimed Dower. Supposing the Gift of the House to the Daughter had been expressly devised free from all claims of Dower, the Wife would have been entitled to claim Dower out of the rest of the Estate. Wherever a Will can be construed so as to be consistent with legal rights, it must be so construed.

Mr. *Heald*, and Mr. *Temple*, for all the Defendants,
except the Widow :—

The claim of Dower is inconsistent with the Will and it is apparent from the Will that the Testator meant his Widow should not claim Dower.

The Testator directs all his real Estate to be sold by his Trustees, and the produce applied as he directs; and in case his Wife should be *enseint*, he directs that the

(p) Sch. & Lefr. 444.

(q) Coop. 319.

Annuity shall be a charge only on his real Estate, and in that event, he gives his Wife 100*l.* out of his real Estate: could that be meant out of two thirds of his Estate? Having given the House to his Daughter, that part of the Estate is not to contribute to the payment of the Annuity, and that being so, the charge being upon the rest of the Estate, real and personal, must be considered as a charge on a particular Estate, which in *Wake v. Wake* (r), was considered as putting the Wife to her election. *Gratorex* and *Cary* went farther than any preceding Case; and to give the Wife, in this Case, Dower, would be going still farther.

1819.
M. DIALL
and others,
v.
M. A. BRAIN
and others.

The VICE-CHANCELLOR:—

A Wife is put to her Election on the same principles as a Stranger is. To put the Wife to an Election there must be a clear intention to exclude her from Dower, either express or implied; and such an intention is not to be implied either from the Gift of particular Messuages and Hereditaments to the Wife for her Life, or from the Annuity provided for her. But here the Testator directs the Trustees, to whom he devises his Estate, to permit his Daughter to use, occupy and enjoy a certain Freehold House for her Life. I think the Testator contemplated for his Daughter the personal use, occupation and enjoyment of this House, and such personal use, occupation and enjoyment is inconsistent with the Widow's right to Dower out of that House. It is truly said, that if the Testator had expressly declared that his Daughter should enjoy this House, free from his Widow's right of Dower, that the Widow would still have been dowable out of the rest

1819.

D. MIALL
and others,
v.

M. A. BRAIN
and others.

of his Estate. In this case, however, the Gift to the Daughter is, by a direction to the Trustees; to permit her to use, occupy and enjoy this House, and the direction would be in vain, unless he had previously given such an Estate to the Trustees as would enable them to secure by their permission this occupation and enjoyment. This House is part of a general Devise to the Trustees of all his real Estate, and the Testator has not given this House to the Trustees, free from the Widow's Dower, unless he has so given his whole real Estate. I think the Testator has shown a plain intent that the Trustees should take an interest in this House which would exclude the Widow's Dower, and the same intention must necessarily be applied to the whole Estate which passes by the same Devise.

Between JAMES ELLIS - - - Plaintiff;
And

JOSEPH KING - - - Defendant.

23d February.

A Cause being set down, and a Subpana to hear Judgment issued before Publication had passed, the Subpana was ordered to be quashed, and the Cause struck out of the Paper.

A RULE having been entered in this Cause by the Plaintiff, to pass Publication as of the last day of *Michaelmas Term* last, an Order was obtained, 21st *November* 1818, on the Petition of the Plaintiff, to enlarge Publication until the 1st day of *Hilary Term* then next. By another Order 13 *January* 1819, Publication was, at the instance of the Plaintiff, further enlarged until the last day of *Hilary Term*. Notwithstanding Publication was thus enlarged, and no consent was given to

pass Publication before the last day of *Hilary Term*, the Plaintiff caused the Defendant to be served with a *Subpœna*, to appear on the 8th *February*, to hear Judgment on the 11th *February* next, and the Cause was set down for hearing before the Lord Chancellor.

1819.
JAS. ELLIS
v.
J. KING.

Under these circumstances, Mr. J. Martin moved, on behalf of the Defendant, that the *Subpœna* to hear Judgment might be discharged, and the Cause struck out of the Paper.

Mr. Wray, *contra*.

THE VICE-CHANCELLOR:—

In this Case, the Plaintiff, after having obtained an Order to enlarge Publication, and before the time for Publication expired, has set down his Cause. This is irregular. A Cause cannot regularly be set down before Publication, without a special Order, which is sometimes made when the Defendant enlarges Publication, and the Plaintiff is not prevented from setting down his Cause in the mean time.

It is a common practice to enlarge Publication after Rules for passing Publication have expired, where there have been no Witnesses examined on either side, but that practice has no application to this Case.

Let the *Subpœna* be quashed, and the Cause be struck out of the Paper; and the Plaintiff must pay the Costs of this Application.

1819.

In re BEECH.

23d February.

Infant Trustee refusing to convey, after an Order for that purpose, an Order was made that he should convey within a week after service; and the Court suggested, that if he did not obey that Order a Motion should be made for his commitment unless cause.

AN Order had been made, under the Statute, for an Infant Trustee to convey. He refused to comply with such Order; and Mr. *Girdlestone* now moved that he might be ordered to convey within a week, after service upon him of the Order to convey, or show Cause why an Attachment should not go against him, and he cited *ex parte Blythe* before the late *Vice Chancellor(s)*, where such an Order had been made.

THE VICE-CHANCELLOR:—

An Attachment is not the proper course against this Infant, who is not a Party to a Cause. Take an Order that he do convey within a week after service, and if he does not obey this Order, you must move that he stand committed unless Cause.

(s) Sir Thomas Plumer.

HARPER and others v. FAULDER.

3d & 4th March:

THE Bill stated, that in and previous to July 1810, *P. W. Porter* being, or pretending to be, seised of a certain Estate in Fee, subject only, as he alleged, and as the Plaintiffs believed the fact to be, to an annual Rent Charge of 400*l.* payable thereout to his Mother *H. H. Porter*, applied to the Plaintiffs and to Sir *Charles Blicke* for a Loan of 10,000*l.*, and to secure the repayment of the same, with Interest, proposed that he and his Mother would execute to the Plaintiffs and Sir *Charles Blicke* a Mortgage of the said Premises:—That the Money was advanced, and a Mortgage, 28th July 1810, by way of Demise for one thousand years, was executed between *P. W. Porter* of the 1st part, *H. H. Porter* of the 2nd part, and Sir *C. Blicke* of the 3rd part:—That the Mortgage Money was not paid at the time provided by the Deed, or since:—That Sir *Charles Blicke* died, leaving the Plaintiffs surviving, who, as such Survivors, became entitled to receive the Money due on the Mortgage, with Interest:—That in Hilary Term 1815, the Plaintiffs, together with Sir *C. Blicke*, who was then alive, filed a Bill against *Thomas William Plummer*, *George Sidden*, *James White*, *William Scrope*, *John Bennett*, *Thomas Hopper* and *Gabriel Tahourdin*, who claimed under certain Purchases and Encumbrances from *P. W. Porter* subsequent to the Plaintiffs Mortgage, and against *P. W. Porter* and *H. H. Porter*, praying an account of what was due to the Plaintiffs, and that

*Trustees in Trust to raise 35,000*l.*, grant an Annuity secured by a Term of Years for 5,000*l.*, part of the 35,000 *l.*, and the Title Deeds remain in their hands. They afterwards make a Mortgage without informing the Mortgagee of the first Incumbrance. Held, that the Annuity was not postponed to the second Incumbrancer by reason that the Trustees retained the Title-Deeds.*

1819.

HARPER
and others
v.
FAULDER.

the Premises might be sold, and the proceeds applied, first, in payment of the Plaintiffs demand, together with Costs, and then in satisfaction of the other Encumbrances, according to their priorities; and that all necessary Parties might be compelled to join in such Sale; and in case the Court should be of opinion that the Plaintiffs were not entitled to have the Money due to them raised by Sale, then that the Defendants might be decreed to pay the Plaintiffs demand by a day to be named, or to stand foreclosed:—That the Defendants admitted there were no other Encumbrances but those of the Plaintiff and the Defendants:—That the Answers were replied to, and the Cause set down to be heard:—That since such Proceedings, *Margaret Faulder*, of, &c. the Widow of *John Faulder*, and *James White* and *Richard Barker*, as the personal Representatives of *Robert Faulder*, set up a claim in prejudice of the Plaintiffs Mortgage, of a Rent Charge, alleged to have been granted to the said *Robert Faulder*, secured upon the Premises in the year 1808, for a term of ninety-nine years, determinable upon the death of the Survivor of three Persons:—That the Deed securing the same, bearing date *September 1808*, and made between *P. P. W. Porter*, Father of the said *P. W. Porter*, who it was alleged had a Life Interest in the Premises, of the 1st part, the said *P. W. Porter* of the 2nd part; and *Peter Tahourdin*, and the Defendant, *Gabriel Tahourdin*, alleged to have been Trustees of the legal Estate, of the 3rd part; and *Peter Tahourdin* and *Gabriel Tabourdin*, in pursuance of the Trusts reposed in them by an Indenture 7 *May 1808*, at the request and by the direction of *P. P. W. Porter* and *P. W. Porter*, demised to *Richard Barker*, his Executors, &c. the Premises for a term of one thousand years, for securing

payment of the Annuity :—That the Plaintiffs and the said Sir *R. Blicke* had not, when they advanced the 10,000*l.* to *P. W. Porter*, or on the execution of the Mortgage, any knowledge, notice, or information of the alleged Indenture, or that *Faulder* had advanced any Money on the Security of the Premises, nor had any notice thereof until long after the filing of the before-mentioned Bill, or until the Cause was at Issue. The Bill then charged, that if the Deed bore date as alleged, it was, in Equity, void as against the Plaintiffs, and ought to be postponed to their Security, and that besides the want of notice to the Plaintiffs, the said *Robert Faulder* permitted all the Title Deeds relating to the Estate comprised in the Plaintiffs Mortgage, and upon which the Annuity was alleged to be secured, to remain, notwithstanding the grant of the Annuity, in the hands of *P. W. Porter*, or of the said *Peter* and *G. Tahourdin* his Trustees, who joined in executing the Annuity Deed, so that the said *P. W. Porter* and his Trustees were enabled fraudulently to hold the said *P. W. Porter* out to the world as the absolute Owner of the Premises, and to impose himself as such upon others, by the production of the Title Deeds. The Bill further charged, that fraud had been practised upon them and the said Sir *C. Blicke* by the said *P. W. Porter* and his Trustees, upon the occasion of the said Mortgage, and that they repeatedly assured Plaintiffs and the said Sir *C. Blicke* that there was no Encumbrance affecting the Premises, nor any mentioned in the Abstract of Title; and that on advancing the 10,000*l.* all the Title Deeds were produced to the Plaintiff and Sir *C. Blicke*, or their Solicitor, as evidence of an absolute Title, and were, together with the

1819.

HARPER
and others
P.
FAULDER.

1819.

HARPER
and others
v.
FAULDER.

Abstract, submitted to Counsel, who advised that *P. W. Porter* had an absolute Title to the mortgaged Premises, subject only to the Jointure to his Mother:—And that on the Execution of the Mortgage, *P. W. Porter* delivered up the Title Deeds to the Plaintiffs and *Sir C. Blicke*, and that no trace of the Grant or the Annuity was discoverable by the Deeds. The *Prayer* of the Bill was, that the Grant of the Annuity or Rent Charge to *Robert Faulder* might be declared fraudulent, and void as against the Plaintiffs, and that the same ought to be postponed to the Plaintiffs Mortgage; and that the Plaintiffs might have the same relief against the Defendants as if they had been made Parties to the Plaintiffs original Bill, and have the same Relief as if the Grant of the Annuity and Rent Charge had been subsequent to the Plaintiffs Security; and for an Injunction.

The *Answer* of the Defendants stated, that they did not know whether *Robert Faulder* did, or not, permit all the Title Deeds relating to the Estate to remain, notwithstanding the Grant of the said Annuity, in the hands of *P. W. Porter*, or said *Peter* and *Gabriel Tahourdin* his Trustees, without requiring the same to be delivered up; and that they believed that *P.* and *G. Tahourdin* had the Title Deeds in their possession, and that they were and acted as the Attorneys of *Robert Faulder* in respect of the Annuity or Rent Charge, and that *Robert Faulder* required them to do all necessary acts for the Grant of the said Rent Charge or Annuity, and required the Title Deeds should be secured for his benefit; and that the Title Deeds were not delivered to *Robert Faulder*, but were retained by

said *P. and G. Tahourdin* for the benefit and as Trustees thereof, as well for the said *Robert Faulder* in respect of his Encumbrance, as of the said *P. P. W. Porter* and *P. W. Porter*, and the other Persons interested in the said Estate; and they believe that the Deeds were not delivered to the said *Robert Faulder*, or to *Barker* his Trustee of said term of one thousand years, because there were various other Trusts to be executed by the said *P. and G. Tahourdin* respecting the said Estate; and they were retained to enable them to execute the Trusts relating to the said Estates, or in the faith that in any subsequent Encumbrance made by them notice of the Rent Charge or Annuity would be given, and that they would not part with the Deeds without the consent of the said *Robert Faulder*; and the Defendants submitted that it was a fraud upon *Robert Faulder* to deliver up the Deeds to the Plaintiffs; and that *Barker* has the legal Estate in the Premises for the remainder of the term of one thousand years, as Trustee, for the purpose of securing the Annuity or Rent Charge of 600*l.* a year; and that *Robert Faulder*, as a fair Purchaser for a valuable Consideration, was entitled, and that his Representatives are entitled to the benefit of the Annuity or Rent Charge, in preference or priority to the Plaintiffs.

1819.
HARPER
and others
v.
FAULDER.

Mr. Hart, Mr. Horne, and Mr. Treslove, for the Plaintiffs:—

Faulder, by suffering the Title Deeds to be out of his possession, enabled *Porter* and his Trustees to commit a fraud upon the Plaintiffs, whose Security is therefore entitled to priority and preference. The Cases on the subject are rather negative than affirma-

1819.

HARPER
and others
v.
FAULDER.

tive. The *Thatched House Case*, *Peter v. Russell* (u), is the leading Case. This Case shows, that a Mortgagee suffering Deeds to be out of his hands must exculpate himself, and show a good reason for permitting it. In *Penner v. Jemnett*, mentioned in the note to *Towle v. Rand* (x), the note is not accurate. From the Deeds it appeared that *Jemnett* obtained from the Corporation of *Kingston*, on some pretence, two Grants of the same purport, and by that means was enabled to practise a fraud, by raising Money on each Grant. In *Evans v. Bicknell* (y), the present doctrine on the subject is to be found. The *Lord Chancellor* there says, "the mere circumstance of parting with the Title Deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first Mortgagee." Mere negligence, therefore, in parting with Title Deeds does not amount to fraud, but in this Case there is gross negligence. If a Mortgagee does not take the Title Deeds that is gross negligence in him. When a Rent Charge is granted, it is usual to have the Title Deeds deposited in the hands of some third Person. There is no difference between a Mortgage and a Rent Charge, in regard to the possession of Title Deeds, in both Cases they ought to be taken. Substantially, this is a Mortgage; and not taking the Title Deeds amounts to *crassa negligentia* in *Faulder*. If he had taken the Title Deeds, or had an Indorse-

(u) 1 Eq. Abr. 321.

(y) 6 Ves. 174.

(x) 2 Bro. c. 652, and in a

Note to 1 Fonbl. 165, Edit. 2.

ment on the Trust Deed of the Security granted to him, no fraud could have been committed. A Judgment, as an additional Security, was acknowledged; but this Judgment was not docketed. If it had, it would have led the Plaintiffs to inquiry. It shows the secrecy with which this transaction was accompanied.

1819.
HARPER
and another
v.
FAULDER.

In *Penner v. Jemmett* the Mortgagee thought he had all the Title Deeds, therefore it was no fraud in him suffering some, by mistake, to remain with the Mortgagor.

Mr. Bell and Mr. Roupell for the Defendant:—

Let us first consider the Law on this subject, and then apply it to this Case.

In no Case, except in *Goodtitle v. Morgan* (2), was it ever held that merely leaving Title Deeds in the hands of the Mortgagor amounts to a fraud. The Bill does not charge any fraudulent intent in *Faulder*; no fraud is charged, but what arises from not taking possession of the Title Deeds. The Rule laid down in *Evans v. Bicknell* is the true Rule; and according to that Rule there must be fraud intended, or gross negligence, *Plumb v. Fluit* (a) shows there must be fraud; mere negligence gives no preference. In a Bankrupt Petition, which was heard 29 July 1802, the Lord Chancellor said, “there is no Case in which it has ever been held that the mere circumstance of a first Mortgagee not taking the Title Deeds will entitle the second Mortgagee, who has got the Deeds, to file a Bill in Equity

(2) 1 T. R. 172.

(a) 2 Anstr. 432.

1819.

HARPER
and others
v.
FAULDER.

to obtain a preference, and the position of Mr. J. Buller in *Goodtitle v. Morgan* was denied to be law" (b). In *Plumb v. Fluit* (c), it was, after much deliberation, determined, that merely leaving of the Title Deeds in the possession of the Mortgagor was not of itself a sufficient ground to postpone the first Mortgagee. The last Case on the subject is *Barnett v. Weston* (d), in which, upon its being objected in favour of a second Mortgagee, that the first Mortgagee had not taken possession of the Title Deeds, the late *Master of the Rolls*, Sir *William Grant*, said, "that the old Cases for postponing a first Mortgagee under those circumstances, unless a Case of fraud could be made out, had been shaken;" upon which the point was given up. If therefore, this were the case of a Mortgagee in Fee, the mere circumstance of the Mortgagor leaving the Deeds in the hands of the Mortgagee, would not give a preference to a second Mortgagor. But this is a much stronger Case; for here the Money raised by the Annuity and Rent Charge to *Faulder*, was raised in part execution of a Trust, by which the Trustees, the *Tahourdins*, were to raise a much larger Sum; and it was absolutely necessary that the Title Deeds should remain in their hands, to enable them to raise the remainder of the Money in pursuance of their Trust; and *Faulder* could not insist on having the Title Deeds. There were also Charges on the Estate prior to *Faulder's* Charge, and the Trustees were bound to retain the Deeds as a Security for those Charges. These Trusts were created by Deeds of the 6 & 7 May 1808, whereby

(b) This Note was cited by
Mr. Bell from a MS. note of
his, on the Case of *Goodtitle*
v. Morgan,

(c) 2 Anstr. 432.

(d) 12 Ves. 133.

1819.

HARPER
and others
v.
FAULDER.

P. P. W. Porter being Tenant for Life, and *P. Walsh Porter* his Son, Tenant in Tail, subject to a Rent Charge of 400*l.* to *Harriet H. Porter*, the Wife of *P. P. Walsh Porter*, to take effect upon his decease, and to 5,000*l.* for the Portions of the younger Children of the said *P. P. Walsh Porter* and Wife, conveyed the Estate to a Tenant to the Precipe, for suffering a Recovery, which was declared to enure to the use of *Peter Tahourdin* and *Gabriel Tahourdin* and their Heirs, upon Trust, by Sale or Mortgage of a sufficient part to raise 35,000*l.* and pay the same to *P. P. Walsh Porter*, his Executors, &c. And to pay an Annuity of *l.* to said *P. W. Porter*, during the joint Lives of himself and Father, and, subject thereto, in Trust for *P. P. W. Porter* for Life, and to indemnify Purchasers and Mortgagees against the Rent Charge of 400*l.* payable to *H. H. Porter*, and the 5,000*l.* Portions for younger Children: And after the death of *P. P. W. Porter*, to raise and pay said 400*l.* a year, and 5,000*l.* And as to the Residue of the Estate, in Trust for said *P. W. Porter* in Fee. The Trustees therefore could not deliver up the Deeds without a breach of Trust, but if they could, and *Faulder* was entitled to call for the Deeds, his negligence in that respect would not give a preference to a subsequent Encumbrancer, no intentional fraud being practised or attributed to him.

Mr. Hart in reply:—

Supposing *Faulder* was not entitled to the possession of the Title Deeds, he hath still a right to insist that they should be impounded in the hands of a third Person for his Security; and by not insisting on that,

1819.

HARPER
and others
v.
FAULDER.

he enabled the Parties to commit a fraud on the Plaintiff.

The VICE-CHANCELLOR:—

I am not in this Case called upon to decide the general Questions which have been argued. If a prior Encumbrancer is to be postponed simply for leaving the Title Deeds in the hands of the Mortgagor, which is a Proposition very difficult to be maintained at this day, either upon Authority or Principle, such a Doctrine could only be applied in Cases where the Possession of the Title Deeds were legally incident to the Estate of the first Encumbrancer, and where it might be said that he had failed to use reasonable diligence for his own Protection. In this Case, the Trustees, with whom Mr. Faulder dealt, held the Estate, first, upon Trust to raise a Sum of 35,000 *l.*, and next, upon Trust to indemnify the Lenders of the 35,000 *l.* against a Rent Charge of 400 *l.* a year to the Widow of P. P. Walsh Porter, and against a Portion of 5,000 *l.* payable to the younger Children of Mr. Walsh Porter.

Mr. Faulder's Annuity was purchased for 5,000 *l.*, being part of the 35,000 *l.* to be raised by the Trustees, and was secured in the usual manner by a term of Years. Not only the Possession of the Title Deeds was not legally incident to his Estate, nor was he required upon the principle of reasonable diligence to have stipulated for the Possession of them, but it would have been a breach of Trust on the part of the Trustees to have given to one Encumbrancer those Instruments which they were bound to keep for the common Security of all the Persons advancing Money upon the credit of their Trust.

If, therefore, I could adopt in any Case the arguments which have been used on the part of the Plaintiffs, they would form no ground in this Case for postponing Mr. *Faulder's* Annuity.

Bill dismissed against the Representatives of Faulder, with Costs.

1819.

HARPER
and others
v.
FAULDER.

1819.

ESTCOURT v. KINGSCOTE.

12 March.

A Deed creating a Composition Real will not be presumed from payments for two hundred years of a Sum of 20 l. in lieu of Tithes.

ON a Bill for the specific performance of an Agreement to sell an Estate, together with the Tithes, a reference was made to the *Master*, to see if a good Title could be made. The *Master* reported, that the Plaintiff could not make a good Title to the Tithes, or prove an Exemption from the Payment of such Tithes. To this Report an Exception was taken, on the ground, "that the *Master* ought to have reported that the Plaintiff could make a good Title to the Tithes, or prove an Exemption from the Payment of such Tithes."

The Living was a Donative.

Mr. Bell, Mr. Wyatt, and Mr. Trollope, for the Plaintiff:—

On the part of the Plaintiff no Deed certainly is produced by which a Real Composition was created; but there is clear Evidence, for two hundred years, of the payment of 20 l. a year in lieu of Tythes; and from such Evidence, a Deed creating the Real Composition must be presumed. In *Drake v. Smith* (e), where an ecclesiastical Survey was much relied on, the L. Ch. Baron says, "It is said that the ecclesiastical Survey is inconsistent with such a Modus [the Modus set up], and certainly, if the ecclesiastical Survey were entitled to any degree of Credit, I should incline to the same opinion; but I have had experience enough to teach me, that no great reliance is to be placed on documents of that description." So, also in *Jee v. Hockley* (f), the same Judge says, "When I see an uniform Money

(e) 1 Daniel, 104.

(f) 4 Price, 87.

Payment, proved to have been constantly paid for so many years (during living memory), I cannot take upon myself to say, that Evidence which is anterior shall, on that Account alone, destroy evidence which is posterior in point of time." In *Lady Dartmouth v. Roberts* (h), the Court, in favour of uninterrupted enjoyment by the perception of Hay Tithe, presumed a Severance.

1819.
ESTCOURT
v.
KINGSCOTE.

After so long an enjoyment as is proved in this Case, a Deed creating a real Composition must be presumed.

Mr. Heald, Mr. Sugden, and Mr. Haslewood, on the other side, were stopped by

The VICE CHANCELLOR:—

There is no Case in which a Composition real has been presumed from the mere fact of pecuniary Payment alone. If such a Rule were adopted, every Payment which is rank as a Modus might be established as a good Composition Real. It is not necessary that the Deed creating the Composition Real should be proved by direct Evidence; it may be established by presumptive Evidence; but if there be no other Evidence of Composition than mere Payment, the legal Inference and Presumption is, that the Composition originates without Deed. In this Case the Parson being named by the Owner, it is no matter of surprise that the pecuniary Payment has prevailed for so great a length of time.

Exception overruled (i).

(h) 16 East, 334.

(i) Vide *Robinson v. Appleton*, 3 Gwill. 1101; *Heathcote v. Mainwaring*, 3 Bro.

C. C. 217; *Sawbridge v. Burton*, 2 Anstr. 372; *Bennett v. Skeffington*, 4 Price, 143.

1819.

SOWARSBY and others, v. LACY.

17th March.

On Demurrer, held, that a Power given to Trustees to sell Lands, and divide the Profits amongst Cestui que Trusts, who were

JOHN SOWARSBY, by his Will, devised certain Land unto his Children, "the same to be sold when the Executors and Trustees of this my last Will shall see proper to dispose of it; and the Money arising out of the said Lands and Tenements to be equally and severally divided among my above-named children."

Infants, enables the Trustees alone to give effectual Receipts to a Purchaser.

The Lands were sold by Auction, and one *Richardson* the Agent of the Defendant *Lacy*, for whom the Purchase was made, was declared the highest Bidder, at 2810*l.* and signed an Agreement for the Purchase. The Purchaser objected, that the Plaintiffs, the Trustees, and Executors, had no Power under the Will to sell; that they could not give sufficient Receipts for the Purchase-Money, or at least for such parts of the purchased Estate as would belong to the infant Children of the Testator. In consequence of these Objections, the Bill was filed against the Defendant for a specific Performance of the Agreement, to which Bill there was a general Demurrer for want of Equity.

Mr. *Agar*, and Mr. *Sugden*, for the Defendant, cited *Balfour v. Welland* (a); *Warniford v. Thompson* (b); *Cuthbert v. Baker* (c).

(a) 16 Ves. 151.

(b) 3 Ves. 513.

(c) See *Sugd. Vend.* and

Purch. 443, 5th Edit. where the Cases on the Subject are considered.

Mr. Preston, and Mr. Duckworth, in support of the Bill, were stopped by

The VICE-CHANCELLOR:—

It is plain the Testator intended that the Trustees should have an immediate Power of Sale. Some of the Children were Infants, and not capable of signing receipts. I must therefore infer that the Testator meant to give to the Trustees the power to sign Receipts, being an Authority necessary for the execution of his declared Purpose.—The Demurrer must be overruled.

1819.
SOWARSBY
and others,
v.
LACY.

HARRISON v. ARMITAGE.

IN this Case, the Plaintiff insisting he was a Party in a Concern, called upon the Defendant for an Account. The Defendant, by his Answer, denied the Plaintiff was a Partner; and the Defendant's Counsel insisted, that supposing there was a Partnership, a Bill will not lie by one Partner against another for an Account, unless where a Dissolution of the Partnership was prayed by the Bill; and *Forman v. Homfray* (a), was cited.

23d March.
One Partner may file a Bill against his Co-Partner for an Account, although he does not pray by his Bill a Dissolution of the Partnership.

The Vice-Chancellor, in this Case, thought the Evidence did not establish a Partnership, but was clearly of opinion, that one Partner may file a Bill against another for an Account, since it was the only Remedy he had; and said, that *Forman v. Homfray* applied only to a Case of *interim* Management, which would not be granted unless the Bill prayed a dissolution of the Partnership.

(a) 2 Ves. & Bea. 329; and see *Waters v. Taylor*, 15 Ves. 10.

144

CASES IN CHANCERY.

1819.

SLADE and others, v. MILNER and others.

23d March.

Bequest to M. S. of 2,000l.

Stock of my four per Cent. "and in case of her Death, the said 2,000l. Stock shall then be equally divided between her

Children," held, that M. S. being living at the Death of the Testator took absolutely; and that the words, "in case of her Death," referred to her Death before the Tes-

THIS Bill was filed by *Slade, Farish, Norton, and Allen*, Legatees under the Will of *Hester Milner*, against *Milner and Stephen*, the Executors of *Hester Milner*, and against the respective Children of the several Plaintiffs; the Question being, whether the Plaintiffs, the Legatees, were entitled absolutely to their Legacies, or whether each only for Life, with Remainder to their respective Children.

Hester Milner, by her Will, 27th July 1813, among other specific and pecuniary Legacies, bequeathed to the Plaintiff, *Margaretta Slade*, Widow, 2,000*l.* Bank four-per-Cent. Annuities, in the Words following, (that is to say) "I give and bequeath unto *Margaretta Slade*, Widow, 2,000*l.* Stock of my four-per-Cent.; and in Case of her Death, the said 2,000*l.* Stock shall then be equally divided between her Children." And she thereby bequeathed unto Plaintiff, *Hannah Farish*, 2,000*l.* Bank four-per-Cent. Annuities, and 100*l.* a year Bank Long Annuities, in the Words following; (that is to say,) "I give and bequeath unto *Hannah Farish*, two thousand Pounds Stock, of my four-per-Cent.: I also give and bequeath unto her my one hundred Pounds a year Consolidated Long Annuities; and in case of her Death, the said two thousand Pounds Stock, and the one hundred Pounds a year Consolidated Long Annuities, shall be equally divided between her Children." And after giving some other Legacies, and particularly a Legacy to Plaintiff, *Jeremiah Norton*, she thereby bequeathed to Plaintiff, *Ann Norton*, two thousand Pounds Bank three-per-Cent. Reduced An-

muties, in the Words following ; (that is to say,) "I give and bequeath unto *Ann Norton*, his Wife, two thousand Pounds Stock of my three-per-Cent. Reduced Annuities ; and in case of her Decease, the said two thousand Pounds Stock shall then be equally divided between her Children." And she thereby bequeathed to Plaintiff, *Gabriel Allen*, one thousand Pounds Bank three-per-Cent Reduced Annuities, in the Words following ; (that is to say,) "I give and bequeath unto *Gabriel Allen*, Senior, one thousand Pounds Stock of my three-per-Cent. Reduced Annuities ; and in case of his Decease, the said one thousand Pounds Stock shall then be equally divided between his Widow and Children." And the said *Hester Milner*, also, by her said Will, bequeathed one hundred Pounds to *Ann Jacobson*, in the Words and Figures following ; (that is to say,) "I give and bequeath unto *Ann Jacobson*, Widow, the sum of one hundred Pounds ; and in case of her death, the said one hundred Pounds shall be equally divided between her Children." And the said *Hester Milner*, by her said Will, devised her residuary Estate in the following Words "My Debts discharged, and Legacies paid, I do appoint my two kinsmen, *George Milner*, of *Comberton*, and *James Stephen*, of *Great Ormond Street, London*, with my Kinswoman, *Hannah Farish*, of *Cambridge*, to be my residuary Legatees ; and accordingly I do then give and bequeath unto them all that shall then remain of my Property in the Bank of *England*, Copper Company, or elsewhere, with all my Money and Bank Notes which shall be found in my House ; and also my Household Furniture, Optical Glasses, Pictures, Engravings, and China, such only excepted as are assigned unto other Persons in this Will. It is also my Will, that in case these my

1819.

SLADE
and others,
v.
MILNER
and others.

1819.

SLADE
and others,
v.
MILNER
and others.

residuary Legatees, *George Milner, James Stephen, and Hannah Farish*, should have departed this Life before me, and consequently, before this Will takes place, it is then my Will that the aforesaid residuum of my Property in the Bank of *England*, Copper Company, or elsewhere, with all Money and Bank Notes found in my House, and every other Article, as specified unto them, shall then be equally divided between the following Persons, each of whom are my Relations, the Children of *James Stephen*, the Children of the late *William Stephen*, and the Children of *Hannah Farish*.

When the Pleadings were opened, the *Vice-Chancellor* desired to hear what the Defendants had to urge in opposition to the Bill.

Mr. Horne, and *Mr. Garratt*, for all the Defendants except the Executors:—

Taking the whole of the Will together, it is apparent that the Legacies claimed by the Plaintiffs were intended only for their Lives; and that after their Deaths the Principal was to go to their Children. The Terms in which the Legacies are given, and the Terms of the residuary Clause, evince the Intention. From the Terms of the residuary Clause, it appears, that when the Testatrix intended to make a Bequest over in the event of the Legatee dying before her, she distinctly says so; she uses the Words, “should have departed this Life before me, and consequently before this Will takes place”; and therefore the expressions used in the Gift of the Legacies to the Plaintiffs “in case of her Death,” “in case of her Decease,” and, “in case of his Decease,” are not to be restricted to the event of the Death of the Legatee in the Life-time of the

Testatrix but it was thereby meant to give a Life-Interest to the Parents, and the Principal to their Children. They cited *Billings v. Sandom* (a), and *Douglas v. Lord Chalmer* (b).

The VICE-CHANCELLOR :—

There is here, first an absolute Gift to the Legatee, and then a Gift over in case of her Death to her Children. It is contended, that the Legatee takes for Life only, and that the Children have an absolute vested Interest, to take effect in possession at all events at her Death: but such a construction is against the force of the expressions used. The Interest of the Legatee is not limited to her Life; and “in case of her Death” imports Contingency or Death, which may or not happen before another event. There is nothing in the other parts of the Will to restrain the natural sense of the Words used. That in the residuary Clause he expressly gives the Residue over to other Persons, in case the first-named residuary Legatees should die before him, manifests that he had in his contemplation the possibility that Legatees might die before him; and though he has used other Words, he has expressed the same Intention with respect to his other Legatees. I give to A. 2,000 l., but in case of her Death, then to her Children: that is, in case of her Death, so as not to be capable of the Legacy; her Death before me, then to her Children. A., therefore, surviving the Testator, takes the Legacy absolutely (c).

(a) 1 Bro. C. C. 393.

(b) 2 Ves. jun. 501.

(c) Vide *Turner v. Moors*,
6 Ves. 557; *Cambridge v.*

Rous, 8 Ves. 13; *Webster v.*

Hale, 8 Ves. 410; *Omnancy*

v. Betan, 18 Ves. 291.

1819.

SLADE
and others,
v.

MILNER
and others.

1819.

23d March.

22d April.

GREENE v. GREENE.

In order to exempt the Personal Estate from the Payment of Debts and Funeral Expenses, there must be a clear Intention either expressed, or to be extracted from the whole Will, that the real Estate is to be applied as the primary Fund for those Purposes.

THOMAS GREENE, by his Will, *April 1801*, bequeathed as follows: "In the first place, I give and bequeath unto my Wife, *Grace Greene*, all my ready Money, Securities for Money, Goods, Chattels, and other personal Estate and Effects whatsoever, which I shall be possessed of, or entitled to, at the time of my Decease, except such Part or Parts thereof, which by this my Will, or by any Codicil or Codicils thereto, I shall dispose of specifically, to and for her own sole and absolute Use; and as to, for, and concerning all and singular my Freehold and Copyhold Messuages, Farms, Lands, Tenements, Advowsons, Hereditaments, and all other my real Estate whatsoever and where-soever, of or to which I am now seised or entitled for any Estate in Possession, Reversion, Remainder, or Expectancy, I give and devise the same, subject to the Payment of my Debts and Funeral Expenses, unto the Rev. *Charles Greene*, of, &c. *Luke Foreman*, of, &c. and the Rev. *John Chandler*, of, &c. their Heirs and Assigns, to hold the same and every Part and Parcel thereof, with their Appurtenances, according to the Nature and Quality thereof respectively, to them, the said *Charles Greene*, *Luke Foreman*, and *John Chandler*, and the Survivor of them, his Heirs and Assigns, upon the Trusts, and to and for the Intents and Purposes hereinafter expressed of or concerning the same, (that is to say,) upon Trust, that they, the said *Charles Greene*, *Luke Foreman*, and *John Chandler*, or the Survivors, or

Survivor of them, or the Heirs or Assigns of such Survivor, do and shall, with all convenient speed, after my Decease, sell, dispose of, convey, and surrender all and singular my said Freehold and Copyhold Premises, (except my Advowson of *Marlingford*,) either together, or in Parcels, and either by public Auction or private Contract, unto any Person or Persons whatsoever, at or for the best Price or Prices that can or may be had or gotten for the same; and I do hereby further declare my Will and Mind to be, and do hereby order and direct my said Trustees, by and out of the Monies to arise by such Sale or Sales as aforesaid, to pay and satisfy all Debts due by me on Mortgage, Bond, or simple Contract, and also my funeral Expenses, and the Expense of proving this my Will, or any Codicil thereto; and after Payment and Satisfaction thereof, then, that they, my said Trustees, and the Survivor of them, or the Heirs, Executors, or Administrators of such Survivor, do and shall stand possessed of and interested in the Residue of such Purchase Money, upon such Trusts as are hereinafter by this my Will expressed and declared of and concerning the same; that is to say, in Trust, to lay out and invest all the said Residue of such Purchase Money in their own Names, or in the Name or Names of the Survivors or Survivor of them, in the Purchase of a competent Share or Shares of the Parliamentary Stocks or Funds of *Great Britain*, or at Interest upon Government, or real Securities in *England*, to be from time to time altered or varied at their or his discretion, and stand possessed of or interested in the same, and also the Stocks, Funds, or Securities, upon which the same shall be invested, in Trust, to pay the Interest, Dividends, and annual Produce thereof, unto my said Wife, *Grace*

1819.

GREENE
v.
GREENE.

1819.

GREENE
v.
GREENE.

Greene, and her Assigns, for and during the Term of her natural Life, and from and after her Decease, then, that they, my said Trustees, or the Survivors or Survivor of them, or the Executors or Administrators of such Survivor, do and shall stand possessed of and interested in the same Stocks, Funds, and Securities, and also the Interest, Dividends, and annual Produce thereof, in Trust, for all and every the Child and Children of our two Bodies, equally to be divided between and among them, Share and Share alike; the Share or Shares of such of them as shall be Sons, to be paid him or them upon their respectively attaining their Age or Ages of twenty-one years, or so much, or such Part or Parts thereof, to be sooner assigned or disposed of, and applied for his or their Preferment or Advancement in the world, as hereinafter mentioned; and the Share or Shares of such of them as shall be a Daughter or Daughters, to be paid, assigned, and transferred to her or them, as and when she or they shall severally attain her or their Age or Ages of twenty-one years, or be married respectively, which shall first happen. But if any such Child or Children, being a Son or Sons, shall attain his or their Age or Ages of twenty-one years, or being a Daughter or Daughters, shall attain her or their Age or Ages of twenty-one years, or be married in the Life-time of my said Wife, then the Share or Shares of such Child or Children, or so much thereof as shall not have been so assigned or disposed of, and applied for his, her, or their Preferment, Advancement, or Benefit respectively as aforesaid, shall be paid, assigned, and transferred to him, her, or them, immediately after the Death of my said Wife; and notwithstanding the postponing the Payment, Assignment, or Transfer of the Share and

Shares of such Child or Children, until after the decease of my said Wife, I do hereby declare, that all and every Share and Shares shall be, and shall be deemed and considered as a vested Interest and vested Interests in such of my said Child or Children, who being a Son or Sons, shall so attain the Age of twenty-one years; and who being a Daughter or Daughters, shall attain that Age, or be married in the Life-time of my said Wife, with benefit of Survivorship, in case any or either of my said Sons shall die under the Age of twenty-one years, or either of my said Daughters under that Age, or Marriage." The Testator, then, after devising the said Advowson for the Benefit of Plaintiff, *Thomas Greene*, in manner in the said Will more particularly mentioned, the said Will proceeds as follows: "And I do hereby declare and direct, that it shall and may be lawful to and for them, the said *Charles Greene*, *Luke Foreman*, and *John Chandler*, and the Survivors and Survivor of them, and the Executors, Administrators, or Assigns of such Survivor, at any time or times during the Life of my said Wife, of their or his own proper Authority, to assign or dispose of and apply any Part or Parts of the Share or Shares of the said Child or Children, although the same did not vest in or become payable or transferable to him, her, or them, not exceeding the sum of one thousand Pounds, in, for or towards the Preferment, Advancement, or Benefit of the said Child or Children respectively, in the World or otherwise, for his, her, or their respective Benefit, or putting or placing, or apprenticing him, her, or them in or to any Trade, Business, or Employment, as to them my said Trustees, or the Survivors or Survivor of them, or the Executors, Administrators, or Assigns of such Survivor, shall seem meet; and upon this further

1819.

GREENE

v.

GREENE

1819.

GREENE

v.

GREENE.

Trust, that they my said Trustees, or the Survivors or Survivor of them, or the Executors, Administrators, or Assigns of such Survivor, during the Life of my said Wife, and with her Consent, or after her decease, then of their or his own Authority, do and shall, in the mean time, and until the Share or Shares of such Child or Children of and in the aforesaid Stocks, Funds, or Securities, shall become payable or transferable to him, her, or them respectively, pay, apply, and dispose of the Interest, Dividends, and annual Produce thereof, or of so much and such Parts thereof as they shall think proper, in, for, or towards the Maintenance and Education of such Child or Children respectively, in such manner as they my said Trustees, or the Survivors or Survivor of them, or the Executors, Administrators, or Assigns of such Survivor, shall in their or his Discretion think proper." And after providing for the Indemnity of his said Trustees, and the Payment of their Costs and Expenses in the usual manner, the Testator appointed his said Wife, *Grace Greene*, together with the said *Charles Greene*, *Luke Foreman*, and *John Chandler*, Executrix and Executors of his Will.

The Bill, stating the Will, further stated, that subsequently to the making of the Will and Codicil, the Testator became seised in Fee of a Freehold Estate, which, it was alleged by the Defendants, he had before his Death agreed to sell, and that such Sale had been completed since his Death by the Defendant, *Grace Greene*, and the Purchase-Money paid to her:—That the Testator died 10th April 1814:—That the Plaintiff, *Thomas Greene*, was his eldest Son and Heir at Law:—That the Defendant, *Grace Greene*, alone proved the

Will and Codicil:—That *Luke Foreman* afterwards died, leaving the Defendants, *Grace Greene*, and *John Chandler*, the surviving Trustees and Executors named in the Testator's Will:—That the personal Estate of the Testator was more than sufficient to pay his Debts and Funeral Expenses:—That the whole thereof, including the net Produce of the Testator's Freehold Estate, had been possessed by the Defendant, *Grace Greene*, who claimed to be beneficially entitled thereto; and that the Defendants, or *Grace Greene*, by their permission, had entered into Possession and Receipt of the Rents and Profits of the Testator's real Estate, devised by his Will:—That the Defendants, *Grace Greene* and *John Chandler*, in their character of Trustees, had sold part of the real Estate devised to them, and received the Sum of 1,763*l.* 11*s.* in part of Purchase-Money; and that Defendant, *Grace Greene*, is in possession or Receipt of the Rents and Profits of the other Estates devised by the Testator, which remain unsold, claiming to be beneficially entitled thereto as Tenants for Life under the Testator's Will; and that the Testator was, (as it is alleged) at his Death considerably indebted.

1819.

GREENE

v.

GREENE.

The Plaintiffs, then, by their Bill, submitted, that all such Debts as the Testator owed at his Death, and also his Funeral and Testamentary Expenses, ought to have been paid, in the first place, out of his personal Estate, and that his real Estates ought not to be liable thereto, except only in aid of his personal Estate, and for so much thereof, if any, as his personal Estate might be insufficient to pay in a due course of Administration. That, on the 22d November 1814, the Plaintiff, *Thomas L'Estrange Ewen*, and the Plaintiff, *Mary Ewen*, inter-

1819.

GREENE
v.
GREENE.

married, whereby the Plaintiff, *Thomas Le Strange*, became entitled to his Wife's Share and Interest in the real Estate of the Testator, or to the Proceeds which still remained unsatisfied, except to the Amount of 1,000*l.* received by the Plaintiff, *Thomas L'Estrange Ewen*, upon his Marriage, from the Defendant *Grace Greene*, as an Advancement in part thereof, under the Trusts of the Testator's Will. That all the Plaintiffs have attained twenty-one, except the Plaintiffs, *Anne Chandler Greene*, and *Charlotte Maria Greene*.

The *Prayer* of the Bill was, "that an Account might be taken of the real and personal Estate of the Testator; and that his Will might be established, and the Trusts thereof performed; and that it might be declared, that the personal Estate of the Testator was liable, in the first place, to the Payment of his Debts and Funeral Expences in a due course of Administration; and that his real Estates were only liable to make good the deficiency (if any,) of his said Debts and Funeral Expenses, which his personal Estate might be insufficient to satisfy; and that the said real and personal Estate might be applied accordingly; and that the said real Estate of the Testator, or the Produce thereof, after answering what they might be liable to make good in respect of the Debts and Funeral Expenses of the Testator, might be properly secured for the benefit of the Plaintiffs, according to their respective Rights and Interests therein, under the Testator's Will; and that all proper Directions might be given for effectuating the several purposes aforesaid."

The Defendants, by their Answers, admitted the Facts stated in the Bill; and the Defendant, *Grace*

Greene, insisted she was entitled to the Purchase-Money for the Estate acquired and sold by the Testator, after the making of the Will and Codicil, and that she was entitled to the rest also of the Testator's personal Estate, and that the same was exonerated by the Testator's Will from the Payment of all the Testator's Debts and Legacies; and that she was entitled to the Rents and Profits of the Testator's real Estates, as Devisee thereof, for Life, subject to the Payment of the Testator's Debts and Funeral Expenses, and subject to the Trusts and Directions of the Will for the Sale thereof.

1819.

GREENE
v.
GREENE.

Three Questions were made; 1st, whether the Purchase-Money for the Estate acquired by the Testator, after the making of his Will, and agreed to be sold, but the Conveyance of which Estate, and the Payment of the Purchase-Money, took place after the Testator's Death, was to be considered as part of his personal Estate; 2dly, whether the personal Estate of the Testator was exonerated from the Payment of his Debts, Funeral Expenses, and the Costs of proving the Will; and 3dly, whether the Defendant, *Grace Greene*, was entitled to the Rents and Profits of such part of the real Estate as remained unsold, until a Sale took place (a).

The VICE-CHANCELLOR:—

The Gift of the personal Estate to the Wife for her own use, without more, is a Gift subject to those

22d April.
1819.

(a) The Reporter, owing to indisposition, was not present during the Argument.

1819.

GREENE

v.

GREENE.

Charges which, by Law, are incident to it; the Payment of the Expenses of the Funeral and the Probate, and the Debts. The Testator may, if he pleases, provide a Fund auxiliary to those purposes from his real Estate. He may, if he pleases, as between those who claim beneficially under his Will, constitute his real Estate the primary Fund for those purposes. The question here is, whether this Testator meant that his real Estate should be a primary, or an auxiliary Fund?

The Devise to the Trustees is first made, subject to the Payment of his Debts and Funeral Expenses; but a Charge for Payment of Debts and Funeral Expenses, does not necessarily import more than that the Testator intended that recourse should be had to the real Estate for those Purposes, if the personal Estate were insufficient,

The Testator then directs the Trustees to proceed to a Sale of the real Estate, with all convenient speed after his Death; and out of the Monies to arise by such Sale to pay and satisfy all Debts due by him on Mortgage, Bond, or simple Contract, and also his Funeral Expenses, and the Expenses of proving his Will, or any Codicil thereto; and after Payment and Satisfaction thereof, to lay out the Residue of the Purchase Monies at Interest, upon Government or real Securities, for the Benefit of his Wife for Life, with remainder to his Children.

This Direction, that the Trustees, who form only a part of the Executorship, should, out of the Produce by Sale of the real Estate, pay all Debts and Expenses,

and after Payment thereof invest the Surplus, for the benefit of the Wife for Life, with Remainder to the Children, when coupled with the circumstance, that the Devise to the Trustees is expressly made subject to the Payment of Debts and Funeral Expenses, and with the Gift to the Wife, for her own sole and absolute Use, of all the Testator's ready Money, Securities for Money, Goods, Chattels, and other personal Estate and Effects whatsoever, which the Testator should be possessed of at the time of his Death, does appear to me to convey a clear intimation of Intention, not that the real Estate should be auxiliary, only to be applied in case the personal Estate should prove deficient, but that the real Estate should directly, and at all events, be applied as the primary Fund for the Payment of the Debts, Funeral Expenses, and the Expenses of the Probate, and that the Wife should take the personal Estate exempt from those Charges.

1819.

GREENE

v.

GREENE.

It is true, that in many Cases, in which it has been decided that the personal Estate remained the primary Fund, there were Expressions with respect to the real Estate, which may be considered as nearly equivalent to those in the present Will. It will be found, that in no such Case were those Expressions altogether equivalent; but what is more material, it will be found, that in every such Case there were other Expressions in the Will of an opposite tendency, qualifying the force of the Expressions with respect to the real Estate.

In the *Duke of Ancaster v. Mayer (b)*, a Term was created for the purpose of raising so much Money as should be sufficient to pay and satisfy all the Debts

(b) 1 Brown, 454.

1819.

GREENE

v.

GREENE.

which the Testator should owe at the Time of his Decease, his Funeral Charges and Legacies.

But in the Duke of *Ancaster v. Mayer*, the Testator declared the Gift of the personal Estate to be a Devise of the Residue of the personal Estate; and the Executors were directed to satisfy their Disbursements, Expenses, and Charges in proving the Will, or by any other Ways or Means in or about the Execution of the Will, either out of the personal Estate, or the Monies raised from the real Estate.

In *Stephenson v. Heathcote* (c), the Words were "In Trust, by Sale of so much or such Parts of the said Premises as should be sufficient to raise Money to pay all Debts and Funeral Expenses." But there, the Gift was not, as here, of the personal Estate, but of all the Residue of his personal Estate whatsoever to his Wife for ever, whom he appointed his sole Executrix.

In *Inchiquin v. O'Brien* (d), the Trustees were directed to sell a competent part of the Premises in the first Place, to pay off all his Debts and Legacies. But there the Testator directed that the Residue of the Produce of the real Estate should be accounted personal Estate, and gave all the Residue of his personal Estate, after Payment of his Debts and Legacies, to Lord *O'Brien*.

In *Tuitt v. Lord Northwich* (e), the Trustees were empowered to raise by Sale, or Mortgage of the real

(c) Cited in *Bootle v. Blundell*, 1 Mer. 193.

(d) Amb. 33.

(e) 4 Ves. 816.

Estate, so much Money as should be requisite to pay and discharge all such Debts as the Testator should owe at his Death. But there also, there was no other Gift of the personal Estate than a general Gift of all the rest, Residue, and Remainder of his personal Estate to his two Sisters.

1819.

GREENE

v.

GREENE.

In *Watson v. Brickwood* (f), the Residue of the Personal Estate was given by the Will expressly, after the Payment of Debts, Funeral Expenses, and Legacies. The Testator, by a Codicil, which in no manner touched the personal Estate, authorized his Trustees, in order to raise Money for the Payment of all and singular his Debts and Legacies, to mortgage a competent Part of the freehold Estate. It was held, that the personal Estate, being expressly given by the Will, after Payment of all Debts and Legacies, the Testator could only mean by his Codicil to create an auxiliary Fund.

The present Decision is, therefore, as I believe, to be reconciled with every Authority. It will be found to be supported in Principle by the Case of *Burton v. Knowlton* (g), before Lord *Alvanley*, and to be a much stronger Case for exemption; and also by the Case of *Kynaston v. Kynaston*, before Lord *Bathurst*, which is cited in the Case of *Ancaster v. Mayer*.

(f) 9 Ves. 447.

(g) 3 Ves. 107.

1819.

GREENE

v.

GREENE.

The Decree was as follows : " Declare that the real Estate of the Testator is liable in the first place to pay his Debts and Funeral Expenses, and the Charges of proving his Will, in exoneration of his personal Estate ; and that the Produce which arose by the Sale of the real Estate of the Testator, situate in the City of *London*, contracted to be sold by him in his Life-time, constituted part of the Residue of his personal Estate ; and that the Defendant, *Grace Greene*, is entitled to the Rents and Profits of the Testator's real Estates, during her Life, until the Sale thereof. And the Plaintiffs, by their Counsel, waving the rest of the Prayer of their Bill, It is Ordered, that all Parties be paid their Costs of this Suit, to be taxed," &c.

1819.

Between SARAH BEESTON - - - Plaintiff,

And,

FREDERICK BOOTH, HORATIO LEGGATT,
ROBERT GARSTIN LONGMORE, otherwise
ROBERT LONGMORE GARSTIN, CORDELIA
GARSTIN, WILLIAM HAY, and MARY his
Wife, (when they the said ROBERT GARSTIN
LONGMORE, otherwise ROBERT LONGMORE
GARSTIN, CORDELIA GARSTIN, WILLIAM
HAY, and MARY his Wife, shall respectively come
within the Jurisdiction, and be amenable to the
Process of the Court,) and JOHN BRADSTREET
GARSTIN, and MARY, his Wife when she, the said
MARY, shall come within the Jurisdiction of the
Court - - - Defendants.

ROBERT GARSTIN, by his Will, bequeathed to
the Defendants, *Frederick Booth*, and *Horatio Legatt*, all
his Leasehold Estates, and also all his Monies, Secu-
rities for Money, and all and every his Goods, Chattels,
Stocks, Furniture, Plate, Horses, Cattle, and personal
Estate whatsoever and wheresoever, to hold to the said
Frederick Booth, and *Horatio Legatt*, their Executors,
Administrators, and Assigns, upon Trust, that they
and the Survivor of them, his Executors and Admi-
nistrators, did and should, immediately after his De-
cease, or as soon after as they might think fit, sell and
dispose of, and convert into Money, all his said Lease-
hold Estates, and all such Parts of his personal Estate

20th March.
The Testator
directs his Ex-
ecutors and
Trustees, after
payment of his
Debts and Funer-
al Expenses, in
the next place to
pay three pe-
cuniary Legacies;
and afterwards
to raise and set
apart three other
Legacies. There
is no priority
between the two

sets of Legatees, but in case of deficiency of assets each must abate equally.

VOL. IV. M

1819.

S. BEESTON

v.

F. BOOTH,
and others.

and Effects as should not consist of ready Money; and also collect and get in all Debts then owing to him on Mortgage, Bond, simple Contract, or otherwise, and did and should, in the first place, pay, satisfy, and discharge all Debts, Sum and Sums of Money, due and owing by him at his Death, and his Funeral and Testamentary Expenses, and all other Costs, Charges, Outgoings, and Disbursements, in respect of the said Leasehold Estates, and attending the Execution of the Trusts of his said Will; and in the next place, pay to Plaintiff the Sum of 1,500*l.* and to the said *Frederick Booth*, or otherwise, to permit and suffer him to retain and take the Sum of 500*l.* and to the said *Horatio Leggatt*, or otherwise permit him to retain and take the Sum of 200*l.*; and that Interest should be paid on the said several Sums of 1,500*l.*, 500*l.* and 200*l.* respectively, at the rate of *five Pounds per-Cent.* to be computed from the end or expiration of three Months next after his decease; and that the said Trustee or Trustees should afterwards raise and set apart the several Sums of 2,000*l.* 6,000*l.* and 2000*l.* to be held by the Trustee or Trustees for the Time being of his said Will, upon the Trusts and for the Purposes therein and after mentioned, concerning the same respectively; and after paying, raising, and setting apart the said several Debts, Legacies, Sum and Sums of Money, and other Encumbrances charged, or the Money, Rents, and Profits to arise, be collected and received as aforesaid, to stand and be possessed of the Residue and Surplus thereof which should remain after answering the purposes aforesaid, and also of such Legacies which might become lapsed, and not thereby otherwise provided for, upon Trust, in case the same Residue or Surplus, and

lapsed Legacies, should not exceed the Sum of 1,000*l.* then upon Trust, for his Brother, *Chichester Fortescue Garstin*, (now deceased,) absolutely; and if the same should exceed that Sum, and not exceed the Sum of 1,500*l.*, then upon Trust, to pay thereout the Sum of 1,000*l.* sterling to his said Brother, *Chichester Fortescue Garstin*, and the remainder to Plaintiff; but in case the Residue or Surplus of the Money to arise be collected and received as aforesaid, and such last-mentioned lapsed Legacies should exceed the Sum of 1,500*l.* then, that the Trustee or Trustees should, by and out of such Excess, &c. after answering and paying the said last-mentioned Sums of 1,000*l.* to his said Brother, and 500*l.* to Plaintiff, pay to her one further like Sum of 500*l.* to his reputed Son, Defendant, *Robert Garstin Longmore*, otherwise *Robert Longmore Garstin*, the sum of 1,000*l.* sterling, and to each of Testator's three Grandchildren, Defendants, *Robert Garstin*, *Cordelia Garstin*, and *Mary Hay*, late *Mary Garstin*, Spinster, the like Sum of 1,000*l.*, and the Residue (if any) to his said Grandson, *Robert Garstin*, absolutely; and in case such Excess as last mentioned should not be competent to pay and satisfy the whole of the said several last-mentioned Legacies of 500*l.* 1,000*l.* 1,000*l.* 1,000*l.* and 1,000*l.* last thereinbefore directed to be paid to, or in Trust for Plaintiff, his said reputed Son, and his said Grandchildren, then Testator directed that said several last-mentioned Legatees should abate respectively, in proportion to such their said respective Legacies; and the last-mentioned Legacies given or intended for each and every of them his said reputed Son, and his said Grandchildren, should be held by the said Trustee or Trustees, for the time being of his Will, in Trust for his said reputed Son and Grandchildren respectively, to be

1819.

S. BRESTON

v.

F. BOOTH,
and others.

1819.

S. BEESTON

v.

F. BOOTH,
and others.

vested in and payable to him or her respectively in the same manner, and upon the same Contingency, and under or subject to the same or the like Powers, Provisions, and Limitations over, as are therein and hereinafter expressed and declared concerning, as to his said reputed Son, the Legacy or Sum of 2,000*l.* thereinafter by his Will provided for him ; and as to each of his said Grandchildren, his and her respective Share and Interest of and in the said Sum of 5,000*l.* thereinafter by his Will provided for them, and that the said several Sums of 2,000*l.* 6,000*l.* and 2,000*l.* thereinbefore directed to be raised and set apart as therein mentioned, were so directed to be raised and set apart, upon Trust, that the said Trustee or Trustees for the time being of his Will, did and should, from time to time, during the continuance of the Trust of his Will, and in his or their Discretion, and of his and their proper authority, lay out and invest at Interest, each and every of the said last-mentioned Trust Monies thereof separately and distinct from the other or others in or upon any of the Stocks or Funds of *Great Britain*, or upon real Securities in *England*, and also did and should, from time to time, alter, vary, and charge the Securities in or upon which the said Trust Monies should from time be respectively invested, either as occasion should require, or as the said Trustee or Trustees should think fit, and stand and be possessed of the said several last-mentioned Trust Monies, and the Stocks, Funds. and Securities, Interest, Income, and Dividends thereof, upon the Trust, and for the Ends, Intents, and Purposes therein and hereinafter expressed and declared concerning the same (that is to say) as to one of the said Trust Monies, or Sums of 2,000*l.* and the Stocks, Funds, and Securities in or

upon which the same should, from time to time, be invested upon Trust, that said Trustee or Trustees for the time being of his Will, did and should pay into the proper Hands of Defendant, *Mary Garstin*, to and for her own particular Use, separate and apart from and exclusive of her then present Husband, and so and in such manner that the same might not be under his control, or subject or liable to his Debts, Contract, Forfeiture, or Engagement, the Dividends, Interest, and Income of his said last-mentioned Trust Money, or Sum of 2,000*l.* and the Stocks, Funds and Securities thereof, which should become due during her Life-time; and the said Testator declared, that Receipts of said *Mary Garstin* might be good and sufficient discharges for the Money which should thereby be expressed to be received; and that the said *Mary Garstin* should not nor might anticipate, charge, or assign all or any part of the said Dividends, Interest and Income, before the same should become due and payable, and as to, for, and concerning the said Trust-Money, or Sum of 6,000*l.*, and also from and after the Decease of said *Mary Garstin*, as to the said last-mentioned Trust-Money, or Sum of 2,000*l.*, and the Stocks, Funds, and Securities in or upon which the said several Trust-Monies of 6,000*l.* and 2,000*l.* should be invested upon Trust, that the said Trustee or Trustees for the time being did and should assign and transfer the said Sum of 6,000*l.* the Stocks, Funds, and Securities, and the Interest, Dividends, and Income, which after the decease of the said Testator should become due thereon, and also after the Decease of the said last-mentioned *Mary Garstin*, the said Sum of 2,000*l.* and the Stocks, Funds, and Securities thereof, and the Interest, Income, and Dividends, which should after the Decease of said

1819.

S. BERTON

v.

F. BOOTH,
and others.

1819.

S. BEESTON

v.

F. BOOTH,
and others.

Mary Garstin, become due thereon unto such of his (Testator's) Grandchildren, *Robert Garstin*, *Cordelia Garstin*, and *Mary Garstin*, as should be living at his Decease, in manner therein mentioned, the Testator appointed said *Frederick Booth*, and *Horatio Leggatt*, joint Executors of his Will.

The Assets of the Testator, after the Payment of his Debts and Funeral Expenses, did not amount to more than 8,000*l.*; and the Question was, Whether the Plaintiff was entitled to receive the first Legacy of 1,500*l.* without any Abatement?

Mr. Bell, and *Mr. Roupell*, for the Plaintiff; and *Sir A. Pigott*, and *Mr. Cross*, for the Defendants, the Executors, who were interested in the same Question, in regard to their Legacies.

This is a Question of Intention. It is clear, from the language of the Will, that the Legacies of 1,500*l.* 500*l.* and 200*l.* were not intended to abate on a deficiency in Assets. The Testator gives all his personal Estate to his Executors, "*in the first place*, to pay Debts and Funeral and Testamentary Expenses, and, *in the next place*, to pay to the Plaintiff 1,500*l.*, *Booth* 500*l.*, and *Leggatt* 200*l.*, and then directs, "that Interest be paid on the said several Sums of 1,500*l.*, 500*l.* and 200*l.* respectively, at the Rate of five-per-Cent, to be computed from the end or expiration of three Months next after my Decease;" and then the Testator says, "and my Will is, that the said Trustees do and shall *afterwards* raise and set apart the several Sums of 2,000*l.* 6,000*l.* and 2,000*l.* upon the Trusts herein-after mentioned."

1819.

S. BEESTON
v.
F. BOOTH,
and others.

It appears from the Will, that the Plaintiff was intended to take her Legacy of 1,500*l.* with five-per-Cent. Interest, without being subject to Abatement; the Words, "*in the first place,*" "*in the next place,*" and "*afterwards,*" in the Gift of the Testator's Property, and the Provision for Interest upon the Legacy of 1,500*l.* at five-per-Cent., and the subsequent parts of the Will, in which, if the Property be sufficient, she gives the Plaintiff a second Legacy without Interest, and not subject to abatement, and afterwards, a third Legacy, expressly subject to abatement, afford altogether sufficient proof of the Testator's intention that the first Legacy of 1,500*l.* should not be subject to abatement, in case of a deficiency of Assets. The Legacy to the Plaintiff and the Executors were first to be paid, and then the other Legacies, just as if the Testator had said, and after the Payment of the Plaintiff's and Executors Legacy, the Residue to be paid to such and such Legatees. *Page v. Leapingwell (a).*

Mr. Wetherell, and Mr. Haslewood, for the Defendants, interested in contending that the Plaintiff's Legacy was liable to Abatement.

There is nothing in this Will expressive of a clear intention that the Plaintiff's Legacy of 1,500*l.* was to be paid before the other Legacies, and not be subject to Abatement in case of a deficiency of Assets. When Legacies are given *successive*, it does not therefore follow they are to be paid in succession. In *Browne v. Allen (b)*, it was held, that a Legacy to be paid "*is*

(a) 18 Ves. 463.

(b) 1 Vern. 31.

1819.

S. BEESTON
v.
F. BOOTH,
and others.

the first place," was subject to abatement. In *Lewin v. Lewin* (c), Lord Hardwicke observes, "If the Testator says," '*Imprimis,*' "or, in the first place, I give such a Legacy, that amounts only to the order in which he expresses his Gifts in the Will; to nothing more." In *Blower v. Morret* (d), Lord Hardwicke says, "Cases of this kind, of a Claim by pecuniary Legatees of a priority of Satisfaction, so as not to abate in proportion with others, seldom come before the Court, and there are fewer in which the Court has given way to Claims of that kind; there must be, therefore, very strong Words to induce the Court to give way to it."

The VICE-CHANCELLOR:—

Unless a contrary intent appear upon the Will, it must be presumed that a Testator considers that he has Property sufficient to answer all his Legacies; and that he has an equal intention that all should be equally paid. This presumption of Equality is not to be repelled by ambiguous expressions, but must prevail, unless there be clear intent to the contrary.

The expressions, "In the first place, I give to *A*, then to *B*, then to *C*," are not Evidence of such intent, for they mark only the order in which it occurred to the Testator to name the Objects of his Bounty.

A Gift to *A*, payable at one Month after my decease, to *B*. at six Months, and to *C*. at twelve Months, are not Evidence of such Intent; for, although to be paid

(c) 2 Ves. 415.

(d) 2 Ves. 420.

at different times, the presumed intention remains that they are all equally to be paid at those times.

1819.

S. BEESTON

v.

F. BOOTH,
and others.

The expressions, " In the first place, I direct that my Executors shall pay to *A.* then to *B.* then to *C.*" are not Evidence of such Intent, for they mark only the order in which it occurs to the Testator to give the Directions to his Executors.

The expressions, " I direct that my Executors shall, in the first place, pay to *A.*, in the next place, to *B.*, then to *C.*," are not Evidence of such Intent, because they do not necessarily import more than the order of Payment; that *A.* shall be paid by my Executors in the first place, or out of the first Monies which they have applicable to the Payment of Legacies; *B.* in the next place, or next in order; and then, or next in order, *C.*; and these expressions are therefore consistent with the presumed intention that all shall be equally paid in their order.

The priority claimed by the three Legatees in the present Case rests only upon expressions similar to these: " In the next place," that is, first in order, or out of the first Monies, the Executors are to pay the Debts and Expenses. In the next place, or next in order, the Executors are to pay the three Legacies of 1,500*l.* 500*l.* and 200*l.*; and afterwards, or next in order, the Executors are to raise or set apart the three Sums of 2,000*l.* 6,000*l.* and 2,000*l.* The distinction which I was at first disposed to take upon the word, " afterwards," is too thin for practical Use, afterwards, here, is next in order; in the next place.

Between these two sorts of Legacies therefore, I find

1819.

S. BEZSTON

v.

F. BOOTH,
and others.

in this Will the declared Intention of the Testator, that the three first named Legacies are to be paid first in order; first in time; or out of the first Monies; but I find nothing to repel the presumption, that the Testator considered he had Property sufficient to pay all these Legacies, and had the same equal intention that all should be equally paid in their order.

It is hardly worth remarking, that there are subsequent expressions in the residuary Clause of this Will, which manifest that the Testator considered that his Property was fully equal to both Sets of Legacies; and that the three first Legacies are, in point of fact, made expressly payable, first, in order of Time, being payable at the end of three Months, whereas the other three Legacies are not payable till the end of the Year. I lay no stress upon these circumstances.

My Opinion is, that this Testator has expressed no intention in this Will which gives to the three first Legatees a claim to be paid in full, to the prejudice of the three next Legatees; and that the Assets being deficient, these two sets of Legatees must abate equally.

There are other Legacies given in this Will, but they are expressly given out of such uncertain Residue or Surplus as shall remain, after providing for the Debts, Expenses, and two first sets of Legacies; and the intention of the Testator, that they are to be payable only in case there be a Surplus, is too plain to admit of Question.

WHEELER v. MALINS.

1818.

THE Plaintiff in this Suit having become a Bankrupt, Mr. *Wetherell* on behalf of the Defendant, moved, that the Plaintiff should be directed to make his Assignees parties to the Suit, by Bill of Revisor, or Supplemental Bill, within a Month, or otherwise, that the Bill should stand dismissed, with Costs; and he cited as an Authority for the Motion, *Randall v. Mumford* (a).

24th March.

On Bankruptcy of Plaintiff, Motion may be made by the Defendant that the Plaintiff procure his Assignees to file a Supplemental Bill, or that Bill shall stand dismissed without Costs.

The Motion was made on Notice, but nobody appeared for the Plaintiff.

The VICE-CHANCELLOR:—

Take an Order, that if a Supplemental Bill is not filed within a Fortnight, that the Plaintiff's Bill stand dismissed, but not with Costs. The Mode of Proceeding in this Case is analogous to the Case where a Plaintiff obtains an Injunction and dies; in which Case, the Defendant may move that the Injunction be dissolved, unless the Representatives of the deceased Plaintiff revive within a certain time (b).

The Lord Chancellor, according to one of the reported Cases, seems to entertain an opinion that it would be useful in this Court to hold that Bankruptcy abated the Suit; and with this opinion I entirely concur. In principle, the Suit is abated, for the Bankrupt has lost his capacity to sue. Where a Bankrupt's Bill is dismissed for want of prosecution, he cannot be made to pay Costs; and the necessity of such a motion as the present is a hardship upon a defendant.

(a) 18 Ves. 424.

and see *Hill v. Hoare*, 2 Cox,

(b) *Browne v. Warner*, before Lord Eldon, 1808. M. S.;

50. *Townsend v. Lowe*, 1 Cox, 410.

1819.

Between

ROBERT TILLOTSON, (since deceased) and
CHRISTOPHER LISTER - - - Plaintiffs,

and,

JOHN HARGREAVES, and others - Defendants :

And between

The said CHRISTOPHER LISTER - - Plaintiff,

and,

BERNARD CROOK, JOHN BERESFORD, and
JAMES KERSHAW, Assignees of the Defendant
WILLIAM CLEGG - - - Defendants.

24th March.

Motion that Defendants, whose title in the trust funds was in question in the Cause, might have advanced to them a Sum of Money to answer the Expense of executing a Commission in America, refused.

ABRAHAM HARGREAVES, in the Pleadings of this Cause, named by his Will, dated in *November 1799*, and a Codicil thereto, dated *30th October 1801*, devised his Estates to the Plaintiff, *Robert Tillotson*, (since deceased,) and *Christopher Lister*, in Trust for the second and third lawful Sons of his Brother *Christopher Hargreaves*, as therein particularly mentioned.

The Plaintiffs, for the purpose of carrying the Trusts of the Will into execution, filed their Bill, and thereby prayed that the Will might be established, and the Trusts thereof performed, and that the usual Accounts might be taken, and that the clear Residue of the Testator's Estates might be paid to the Accountant-General, and laid out for the Benefit of Defendants, *Abraham*,

John, and *Thomas*, the Sons of *Christopher Hargreaves*, or such Person or Persons as should appear to be entitled thereto.

1819.

R. TILLOTSON
and another,

v.

J. HARGREAVES
and others:

And

C. LISTER

v.

B. CROOK
and others.

The Plaintiff, *Robert Tillotson*, died, and the Defendant, *William Clegg*, became a Bankrupt, and a Bill of Revivor and Supplement was filed against *Bernard Crook*, the Executor of *Robert Tillotson*, and *John Beresford* and *James Kershaw*, the Assignees of *William Clegg*, the Bankrupt.

By the Decree in this Cause, *June 1812*, it was referred to the *Master*, to inquire and state to the Court, whether the Defendant *Christopher Hargreaves*, the Brother of the Testator *Abraham Hargreaves*, had any lawful Children living at the Time of the Death of the Testator; and in case he should find that he had, then that the *Master* should inquire, and state to the Court, whether any of such Children were since dead, and when they so died, and what was their respective Age or Ages of them so dying. In pursuance of the Decree, an Advertisement was settled by the Master, and inserted in the *American Papers*, which stated, that *Christopher Hargreaves* left *England* some time previous to the year 1785, and went to *South Carolina*, in *North America*, where he settled, and is supposed to have married *Priscilla Ward*, by whom he had three Sons, *Abraham*, *John*, and *Thomas Hargreaves*, who were living in the year 1804, with their said Father in *Pendleton* district, *South Carolina*, and afterwards left their Father, and went seven hundred Miles to the westward.

The Defendant, *Christopher Hargreaves*, having made

1819.

R. TILLOTSON
and another,
v.
J. HARGREAVES
and others:

And
C. LISTER,
v.
B. CROOK
and others.

an Affidavit, that he, some time previous to the year 1785, left *England* for *America*; and that he intermarried with a Woman named *Priscilla Ward*, by whom he had Issue living, the Defendants *Abraham, John, and Thomas Hargreaves*, and that they were still living; and a state of Facts to that effect was left at the Master's Office, supported by the Affidavits of several Witnesses, in such manner, that the Master was perfectly satisfied as to their Claim, and was about to make a Report in their favour, when the Solicitor for the Defendants who claimed an Interest in the said Estates, under the Will of the said Testator, in case of the Deaths of the said *Abraham, John, and Thomas Hargreaves*, requested the Master to grant a Certificate, that a Commission to examine Witnesses was necessary; and he having refused to grant such Certificate, the Solicitor served a Notice of Motion, that the several Affidavits and Testimonials left by or on the behalf of the Defendants, *Abraham, John, and Thomas Hargreaves*, in support of their Claim as the lawful Issue of the said *Christopher Hargreaves*, the Testator's Brother, in the Office of the Master might be suppressed; and that the Inquiries directed by the Decree might be prosecuted, not by Affidavit, but by the Examination of Witnesses upon Interrogatories, either before the Master, or before the Examiner or Commissioners in the Country, or beyond the Seas; and that the Master might issue his Certificate or Certificates for a Commission or Commissions for that purpose, as might be required by the Solicitors for the Plaintiffs or the Defendants, for the purpose of procuring Evidence thereon, with the usual Directions; and on the hearing of this Motion before the Vice-

Chancellor, who thought that no Consent had been given to proceed on Affidavits, and ordered that the *Master* should not proceed further upon the inquiries directed by the Decree upon the Affidavits already made, and any of the Parties were to be at liberty to apply to the Court for a Commission or Commissions to examine Witnesses as they might be advised; and in case of the Deaths of any Persons who had already made Affidavits, before the Examination under any such Commission, the Parties were to have the Benefit of any such Affidavits, saving all just exceptions.

1819.
 R. TILLOTSON
 and another
 v.
 J. HARGREAVES
 and others:
 And
 C. LISTER
 v.
 B. CROOK
 and others.

A Motion was now made on the Behalf of the Defendants, *Abraham, John, and Thomas Hargreaves*, that they might be at liberty to sue out a Commission or Commissions to examine Witnesses in the States of *Georgia and South Carolina*, in the United States of *America*, returnable without delay; and that the Plaintiffs, *Christopher Lister*, and the Defendants, *Bernard Crook*, or one of them, might be at liberty to retain for their use the Sum of 500*l.* in their Hands out of the Rents and Profits of the Estates in the Pleadings mentioned, or so much thereof as might be necessary to pay the Expenses of executing such Commission or Commissions.

Mr. Bell, and *Mr. Parker*, in support of the Motion, mentioned a late Case of *Cockerill v. Barber*, before the Lord Chancellor, where a Sum of 1,500*l.* was allowed to be retained to answer the Expense of executing a Commission abroad.

Mr. Horne, contra.

The VICE-CHANCELLOR:—

There must be very special Circumstances indeed to warrant an advance of Money for the purpose of feeding Litigation. I think it ought not to be done in this Case. Take your Motion, except so far as it seeks the retention of 500*l*.

1819.

TANNER v. DEAN.

24 March.

Order to dismiss a Bill, not served before the Bill is amended, is a nullity, and it is not necessary to move to discharge it.

IN this Case, an Order had been obtained for the dismissal of the Plaintiff's Bill.

Afterwards, and before any Notice was given to the Plaintiff of the Order to dismiss, he amended the Bill.

The VICE-CHANCELLOR was of opinion, (after some time taken for inquiry into the Practice,) that the Amendment of the Bill was regular, no notice having been previously given of the Order to dismiss; and that it was not necessary to move to discharge the Order to dismiss (a).

(a) See *Young v. Smith*, ante, 196.

DICKINSON and others v. SMITH.

26th March.

IN July 1816, two Sequestrators named in a Writ of Sequestration, took possession of the Defendant's Farm, Lands and Premises, and of some growing Crops of Corn, Grass and other Produce, and sold the same, and on the 17th July 1817, they paid the Produce, 371*l.* 17*s.* 6*d.* into Court.

Motion, for payment of a Sum due in respect of a Composition for Tithes, out of a Fund in Court, the Produce of growing Crops on a Farm, paid in by Sequestrators, refused, with Costs.

On the 18th August 1816, before the Sale of the Crops, &c. notice was given to the Sequestrators, of a Claim of *W. E. Tomline*, to the amount of 67*l.* 14*s.* 3*d.* due from the Defendant in respect of a Composition for Tithes in respect of the Lands so taken possession of by the Sequestrators.

A Motion was now made, supported by an Affidavit of the foregoing facts, that the Accountant General might be ordered to pay, out of the Money paid into Court by the Sequestrators, to *Edward Tomline* the Lessee of the Rectorial Tithes and Composition, the Sum of 67*l.* 14*s.* 3*d.* for the Tithes or Composition in lieu thereof, due in respect of the Lands taken possession of by the Sequestrators, and also the Costs of the Application.

Mr. Owen in support of the Motion.

Mr. Heald and Mr. Cooper, *contra*, contended, that as only a Composition was claimed, there was no lien on the Land, but only a personal demand on the

1813.

DICKINSON
and others
v.
SMITH.

Tenant, and therefore that no Claim could be made on the Fund in Court, produced by the Sequestration.

The VICE-CHANCELLOR:—

If Tithes had been due in respect of the Produce of the Land taken possession of by the Sequestrators, this Motion would have been correct, for the Sequestrators would not be justified in taking the Produce of the Land without paying the Tithe; but here there is a Composition for Tithe, which is no lien on the Land, but only a personal demand, recoverable as such at Law. There is no ground for the Motion; it must be refused, with Costs.

1819.
26 March.

ATTORNEY GENERAL v. BURCH and others.

Information against several, praying relief as to some of the Defendants, and a Discovery only as to one. That Defendant, on answering, moved, as of course, and obtained an Order for his Costs, the

A MOTION had been made, as of course, and an Order made, for the payment of Costs to a Defendant, he having answered, and the Information, though praying relief as to others, being merely for Discovery as to him.

Mr. Eagle now moved to discharge that Order, as being irregular.

Mr. Owen, contra.

Bill being said to be only for discovery against him; but such Order was, on Motion, discharged.

The VICE-CHANCELLOR :—

The Order must be discharged. When a Bill is merely for a Discovery, a Defendant, on putting in a sufficient Answer, may move for his Costs, but not where the Bill prays relief. It is said that as to this Defendant, the Bill is merely for a Discovery, and that no Relief is prayed against him; but the Court cannot examine the Record to see whether the Plaintiff may not, under the Prayer of general relief, be entitled to some relief against this Defendant. There is no instance of such an Application; and this Order was obtained on a Motion of course.

Motion granted.

1819.

ATTORNEY
GENERAL
v.
BURCH
and others.

SMITH v. THOMPSON.

MR. Bell moved on the 21st to set aside an Attachment for want of an Answer, with Costs, it having issued without being first entered in the Registrar's Book. The Registrar was desired to see how the Practice was in such Cases, and the Motion stood over for that purpose.

21st and 22nd
April,

An Attachment must be entered in the Registrar's Book before it is issued.

On the next day, the 22nd, Mr. Walker the Registrar stated, that the Attachment must be entered in the Registrar's Book before it is issued, and thereupon the Vice-Chancellor made the Order as prayed.

1819.

HITCHON and another v. BENNETT and others.

22nd April.

The Act of the 47 Geo. III. Sess. 2nd, ch. 74, applies only to Persons who were Traders at the time of their decease, and not to Persons who have left off Trade before they died.

THE question in this Cause was, whether the real Estate of *James Whittle*, deceased, was liable to the payment of his simple Contract Debts, under the 47 Geo. III. Sess. 2. ch. 74. (a)

By an Order made in the Cause, 26 June 1818, it was referred to a *Master* to inquire whether the Tes-

(a) The Words of the Act are "that from and after the passing of this Act, when any Person being, at the time of his death, a Trader within the true intent and meaning of the Laws relating to Bankrupts, shall die seised of or entitled to any Estate or Interest in Lands, Tenements, Hereditaments, or other real Estate, which he shall not by his last Will have charged with or devised, subject to or for the payment of his Debts, and which, before the passing of this Act would have been Assets for the payment of his Debts due on any Security in which the Heirs were bound, the same shall be Assets, to be administered in Courts of Equity for the payment of all the just Debts of such Person, as well due on Simple Con-

tract as on Specialty; and that the Heir or Heirs at Law, Devisee or Devisees of such Debtor, shall be liable to all the same Suits in Equity at the Suit of any of the Creditors of such Debtors, whether Creditors by Simple Contract or Specialty, as they were before the passing of this Act liable to at the Suit of Creditors by Specialty, in which the Heirs were bound: provided always, that in the Administration of Assets by Courts of Equity, under and by virtue of this Act, all Creditors by Specialty, in which the Heirs are bound, shall be paid the full amount of the Debts due to them, before any of the Creditors by Simple Contract, or by Specialty, in which the Heirs are not bound, shall be paid any part of their demands."

tator *James Whittle* was, at the time of his death, indebted to any person, and whom, in respect of any Debt contracted by him during the time he was in trade, and at what time he was in trade, and whether he was, at the time such Debt or Debts was or were contracted, a Trader within the true intent and meaning of the Bankrupt Law, with liberty to state any special circumstances.

1819.
 HITCHON
 and another
 v.
 BENNETT
 and others.

The Master by his Report, 23 March 1819, found, that the Testator *James Whittle*, previous to and from the Month of July 1789, and until the year 1794, carried on the Trade of Joiner, Packing-Case Maker, and Builder, and was during the whole of such time a Trader within the meaning of the Bankrupt Laws. That the Testator in his Life-time was indebted to *John Lane*, of, &c. in the Sum of 400*l.* the greatest part whereof was for a Debt contracted during the time the said *James Whittle* carried on his said Trade or Business, *i. e.* between the Month of July 1789 and the beginning of the year 1794, which Debt was contracted for Work and Labour performed by the said *John Lane*, in his Life-time, and by his Servants, for the Testator *James Whittle*, and for Materials found and provided by the said *John Lane*, in his Life-time, for the Testator *James Whittle*, in and about the said Work and Labour:—That the said *John Lane* died on the 12th April 1796, and that Letters of Administration of his Estate and Effects were, on the 4th July 1796, granted to the Plaintiffs *Laurence Kitchen*, *John Turner*, *Joseph Barker*, and *John Barlow*:—That *John Turner*, *Joseph Barker*, and *John Barlow* having died, leaving *Lawrence Kitchen* surviving, he, as the surviving Administrator

1819.

HITCHON
and another
v.
BENNETT
and others.

of *John Lane*, deceased, in *Hilary Term* 1802, brought an Action against *William Whittle* for the recovery of the Debt of 400*l.* and on the 12th *May* 1812, recovered Judgment for the Sum of 400*l.*, besides 192*l.* 16*s.* for his Costs, making together, the Sum of 592*l.* 16*s.* which Judgment, at the time of the death of the Testator *James Whittle*, remained wholly unsatisfied and due from the Estate of *Whittle* to the Plaintiff *Lawrence Kitchen*, as the personal Representative of the said *John Lane*. And the *Master* further stated, that he did not find that the Testator *James Whittle* was, at the time of his death, indebted to any Person for any other Debt contracted by him during the time he was in Trade.

Mr. *Agar*, and Mr. *Duckworth*, for the Plaintiffs, contended, that as the Testator was once a Trader, he was within the Act, though he was not a Trader at the time of his death.

Mr. *Bell*, Mr. *Horne*, and Mr. *Parker*, contra.

The VICE-CHANCELLOR:—

Formerly, by the policy of the Law, the real Estate of a deceased Debtor was not subject to the payment of simple Contract Debts. This Act, with respect to Traders, who are the objects of the Bankrupt Law, has altered the old Law in the administration of Assets, and has subjected their real Estate to the Payment of their simple Contract Debts; but in the enacting part of the Statute the language is, "That from and after the passing of this Act, when any Person being *at the time of his death* a Trader within the true intent and meaning of the Laws relating to Bankrupts, &c." The Law there-

fore remains as before the Statute, unless the deceased was a Trader *at the time of his death*. The Master has found that this Testator had discontinued trading from the year 1794, being two years previous to his death, and it cannot therefore apply to his Estate the Provisions of this Statute. It is said that this construction will enable a Man, labouring under a mortal disease, to quit his Trade, and thus exonerate his Real Estate. In such a Case it would be difficult to avoid an imputation of Fraud, that would frustrate his purpose. But if a Man should happen to die the day after he has *bonâ fide* quitted Trade, this Statute does not apply to his Estate.

1819.

HITCHON
and another
v.
BENNETT
and others.

SITWELL v. SITWELL.

BY an Order, 15th February 1819, it was ordered that the several Trees therein mentioned, standing on the Plaintiff's Estates, should be sold at *Ludlow*, in the County of *Salop*, at such time or times, and under and subject to such Particulars and Conditions of Sale as the said Master should approve. And it was ordered that the Money to be paid by way of Deposits at the time of sale, and the subsequent Instalments, as the said Master shall direct, should be paid to the Receiver of the Rents and Profits of the said Estates.

28th April.

Certain Timber Trees were ordered to be sold before the Master, the Purchase Money to be secured by Recognizances, and payable by certain Instalments at given periods. The Purchasers being desirous of

paying the Purchase Money immediately, on being allowed a discount, an Order was made for that Purpose, the Defendants consenting.

1819.

SITWELL

v.

SITWELL.

And it was ordered that he should pay the same, the amount thereof to be verified by Affidavit, into the Bank, with the privity of the Accountant General of this Court, to be there placed to the Credit of this Cause, the Account of Timber Money, subject to the further Order of this Court. And it was ordered that the said *Master* should approve of a proper Recognizance to be entered into by the said Purchasers of the said Timber, for the due payment of the said Instalments to be paid by them for the Purchase of the said Trees, according to the Conditions of the said Sale, to be approved of by the *Master*:—The Sale took place on the 8th Day of *April* instant, under certain Conditions, the third of which was, as follows; “ the Purchasers to pay down, at the time of Sale, a Deposit of 10*l. per cent.* on the whole of their Purchase Money, to the Receiver in the said Cause; and to pay a further Deposit of 40*l. per Cent.* to the said Receiver, on or before the 29th Day of *January* 1820; and the Remainder to the said Receiver on or before the 15th day of *November* following; and the Purchasers are within one calendar Month from the day of Sale to give Security, at the Expense of the Vendors, (to be approved of by the said *Master*,) for Payment of the second Instalment of 40*l. per-Cent.* and the remaining 50*l. per-Cent.*; and in the mean time until such Security shall be given, no part of the Timber Trees, Top or Bark, shall be removed.

The Trees were accordingly put up to Sale on the 8th *April* 1819, and sold.

The Purchasers now moved, that they might be discharged from the before-mentioned third Condition

of such Sale, on their respectively paying to the Receiver on or before the 8th *May* next, the Remainder of their Purchase Monies, deducting from such Payment a Discount at five-per-Cent. from the said day of Payment to the 29th *January* next, and a like Discount on a Moiety of the said Purchase-Monies, from the 29th *January* to the 15th *November* 1820; and that the Receiver might be ordered to pay such Monies (the Amount to be verified by Affidavit) into the Bank, and that the same, when so paid in, and the Accumulations, might be laid out in the Three-per-Cents.

1819.

SITWELL

2.

SITWELL.

The Motion was consented to by the Defendants.

The *Vice-Chancellor* thought the Motion was advantageous to the Vendors, and made the Order, as prayed.

1819.

WOOD v. WILLIAMS.

1st May.

On a Bill to foreclose, by W. it appeared, that the Mortgage was made to H. who was a Trustee for W. by whom the Mortgage-Money was advanced. Held, that H. must be a Party to the Suit

THIS was a Bill of Foreclosure. The Mortgage was stated in the Bill to have been made by Demise to one *Holt*; but that he was only a Trustee for the Plaintiff, who advanced the Money, and that *Holt* had executed a Declaration in Writing, whereby he declared, that his Name was made use of in the Mortgage-Deed as a Trustee for the Plaintiff.

The Defendant, by his Answer, amongst other things, insisted that *Holt*, the Trustee, ought to have been made a Party to the Bill.

On the coming on of the Cause, this Day, the Objection for want of Parties was urged by Mr. *Bell*, and Mr. *Belt*; and opposed by Mr. *Wetherell*.

THE VICE-CHANCELLOR:—

It is necessary, that *Holt*, the Trustee should be a Party to this Suit, for it is his Legal Estate which is to be protected by the Decree of Foreclosure, and he is a necessary Party to an immediate Re-conveyance, if the Defendant should redeem. Let the Cause stand over, with liberty to amend, by adding Parties, the Plaintiff paying the Costs of the day.

BENCH and others v. BILES.

6th May.

JOHN HAMPTON, by his Will, gave all his real and personal Estate to his Wife for Life; and after her decease, gave various Legacies, and all the Rest, Residue, and Remainder of his real and personal Estate, he gave, devised, and bequeathed to his two Nephews, *Peter White*, and *William Biles*, Share and Share alike, their Heirs, Executors, Administrators, or Assigns, for ever.

Bequest to Wife, of real and personal Estate for Life; and after her decease, a Gift of various Legacies, and a Devise of all the Rest, Residue, and Remainder of real and personal Estate, to Testator's Nephews. Held, that the Legacies were a Charge on the real Estate.

The question was, whether the Legacies were a Charge upon the real Estate?

On the part of the Plaintiffs the Legatees, *Mr. Heald* contended, that the Legacies were a Charge on the real Estate, and cited *Aubrey v. Middleton (a)*, in which case, the Testator gave several Legacies and Annuities, to be paid by his Executor, and then devised all the Rest and Residue of his Goods and Chattels; and Estate, to his Nephew, (who was his Heir at Law,) and appointed him Executor of his Will. *Lord Cowper* held that the real Estate, on a deficiency of the personal Estate, was chargeable with the Debts and Annuities.

On behalf of the Defendants, *Mr. Bell*, and *Mr. Dowdewell*, insisted that, the real Estate was not applicable in Payment of the Legacies; and they cited

(a) Vin. Abr. tit. Charge (D), Cas. 15, S. C. 2 Eq. Abr. 497.

1819

BENCH
and others,
v.
BILES.

Kightly v. Kightly (b), in which it was held, that though in the case of Debts, slight Words are sufficient to charge the real Estate, because of the moral obligation to pay Debts, yet, that in the case of *Legacies*, they being purely voluntary, a manifest Intention must appear to create a Charge on Land for the Benefit of the Legatees. That, in this Case, there was no such manifest Intention.

The VICE-CHANCELLOR :—

This Case appears to me more clear for the Legatees than that of *Aubrey v. Middleton*. It is truly stated, that Legacies form no Charge on the real Estate to affect the Heir or Devisee, unless the Testator has shown a manifest intention to that effect. The Testator here gives all his real and personal Estate to his Wife, for her life, blending them together as one Fund for her use ; after her death, he gives certain pecuniary Legacies, and then the Rest, Residue, and Remainder of his real and personal Estate, to his Nephew. He plainly continues after her death to treat them as one Fund, the Rest, Residue, and Remainder of which, after payment of his Legacies, is to go to his Nephew. The Decree must be as prayed.

(b) 2 Ves. jun. 328.

CALDECOTT and others v. CALDECOTT
and others.

7th May.

BY the Will of the Testator, the Residue of his personal Estate was given to two of the Defendants, the Executors, in Trust, to receive the Dividends, Interest, and annual Produce, as the same should become due and payable, unto his Nephew, *John Caldecott*, for and during the Term of his natural Life, in equal Portions, on the two most usual Feasts, or Days of Payment, in the year; that is to say, *Lady-day* and *Michaelmas-day*, and after his decease, in Trust for other purposes.

Where Will directed Dividends to be paid to Tenant for Life, at Lady-day and Michaelmas-day, Money was ordered to be laid out in the Three-per-Cents Reduced, the Dividends on that Stock being payable at that time.

A Motion was now made, that the Defendants, the Executors, might be ordered, within a Fortnight, to pay into the Bank, in the Name of the Accountant-General, to the credit of the Cause, the Sum of 2,000*l.* admitted by their Answer to be in their hands; and that the same might be laid out in the purchase of Bank three-per-Cents.; and that the Dividends might be paid to the Defendant, *John Caldecott*, during his Life, or until the further Order of the Court.

Mr. *Temple*, *contra*, objected, that if the Money was laid out in the three-per-Cent. Consols, the Dividends could not be paid at *Lady-day*, and at *Michaelmas-day*, as they would be received in *January* and *July*; but if laid out in the Three-per-Cent. Reduced, they might be paid at the time directed by the Testator.

1819.

The VICE-CHANCELLOR :—

CALDECOTT,
and others,
v.

CALDECOTT,
and others.

As the Dividends are to be paid to the Tenant for Life, in *January* and *July*, the Trusts of the Will cannot conveniently be executed, if the Money is laid out in the Three-per-Cent. Consols ; it must, therefore, be laid out in the Three-per-Cent. Reduced Annuities, which are payable in *January* and *July*.

Mr. *Croft*, the Registrar, on being consulted, said Lord *Thurlow* had made a similar Order.

1819.

NORBURY v. NORBURY.

12th May.

ON the coming on of this Cause, for further directions, Mr. *Bell* desired that a Reference might be made to the *Master*, to ascertain whether it would not be for the benefit of the Infants, that a Sum of Money in the Executor's Hands should be laid out on Mortgage, instead of being applied in the purchase of Three-per-Cent. Consols., as the Interest on the Mortgage would exceed the Dividends of the Money if laid out in the Three-per-Cents.

Court will not order a Reference to the Master, to inquire whether it would be for the Benefit of Infants, that Money in Executor's Hands should be laid out on Mortgage; the course of the Court being to order it to be laid out in the Three-per-Cent. Consols.

The *Vice-Chancellor* said, he did not recollect that such Permission had ever been given unless under very special circumstances, as where there was a Mortgage or Charge on the Infant's Estate, it being the constant course of the Court to order the Money to be laid out in the Three-per-Cents; but he permitted Mr. *Bell* to mention the matter again, if he should find any Authority.

On this Day, Mr. *Bell* mentioned the case of *Poore v. Hawker*, 5th August 1816, in which the late *Master of the Rolls* directed a Reference, to see whether it was for the benefit of the Infant, to lay out a Sum of 20,000*l.* Three-per-Cents. and 17,000*l.* Three-per-Cents. Reduced, or any part thereof, on real Security.

27th May.

1819.

GLEGG

v.

LEOH.

“ As to so much of the said Bill as seeks that this Defendant may answer and set forth, whether the Defendant has not now, or had not lately, or at some and what times or time, and when last, and when in particular, in his Possession, Custody or Power, divers or some and what Conveyances or Conveyance, Deeds or Deed, Instruments or Instrument, Wills or Will, or Copies or a Copy of Wills or a Will, Papers and Writings or Writing, by which *he this Defendant*, or the Persons or Person for the time being seised of or well entitled to the said Improprate Rectory or Parsonage of *Prestbury*, conveyed or meant or intended to convey or to pass to some or other and what Person or Persons all or some and what part of the Tithes of Hay, Clover or other Grasses, of and in the said Parish of *Prestbury* and the titheable places thereof, or some part or parts thereof, or some Moduses or Modus in composition, or other Composition for the last-mentioned Tithes, or for some and which of them, or some and what part or parts thereof, and particularly the Tithes demanded by the said Bill of Complaint, or some and what part or parts thereof; or whether this Defendant does not know, or believe or suspect, or has not some and what reason to know, or believe or suspect, where such Conveyances or Conveyance, Deeds or Deed, Instruments or Instrument, Wills or Will, Copies or Copy of Wills or a Will, Papers, Memorandums and Writings or Writing, or some and which of them, now are or is, or lately or at some time and when in particular were or was, or how otherwise :—Whether this Defendant has not in his Possession or Power divers or some and what Conveyances or Conveyance, Deeds or a Deed, Instruments or an Instrument, Wills or Will, Copies of Wills or of a Will,

1819.

GLEGG

v.

LEGH.

Pap^{ers} and Writings or Writing, by which he this Defendant, or some and which of those Persons through whom he claims to be seised of or well entitled to the said Rectory or Parsonage, claims or claimed to be entitled to the said Rectory or Parsonage Improprⁱate, and to the Tithes demanded by his said Bill, or some and which of them; or whether this Defendant does not know, or believe or suspect, or has not some and what reason to know, or believe or suspect, where or in whose Possession or Power the same, or some and which of them, are or is, or lately or at some and what time, or when last were or was; and whether by such Conveyances or Conveyance, Deeds or Deed, Instruments or Instrument, Wills or Will, Copies or Copy of Wills or a Will, Abstracts or Abstract, Papers and Writings, or some or one and which of them it does not appear:—Whether it is not the truth, that the Tithes demanded by this Defendant by the said Bill, for the Lands belonging to or occupied by the said Plaintiff in the Townships of *Chelford*, *Rainow*, *Bosley*, *Old Withington*, and *Lower Withington*, or in some and which of them, or some and what parts or part of such Tithes, were not purchased by, or well and sufficiently and competently conveyed to the several Persons through whom this Defendant derives his Title to the said Improprⁱate Rectory or Parsonage, or that this Defendant is not now seised of or well entitled to the said Improprⁱate Rectory or Parsonage, or of or to the said Tithes claimed by him by his said Bill, or of or to some and what part thereof, or of or to any Modus or Composition in lieu thereof, or of or to some and what part thereof, or how otherwise:—Whether in several or some one and which of the Deeds, Writings or Instruments,

1819.

GLEGG

v.

LEGH.

which purport to be Conveyances or Assurances of the Tithes claimed by this Defendant in the said Parish of *Prestbury*, or some part thereof, the Tithes claimed by this Defendant by the said Bill, or some and what part thereof, are not mentioned, or are not conveyed to this Defendant *Richard Legh*, or to the Person or Persons under whom he claims the said Improprate Rectory, or how otherwise:—Whether the said Tithes claimed by the said Bill, or some and what part thereof, are not therein, or in some and which of them omitted, or reserved or conveyed to some other Person or Persons than this Defendant, or the Person or Persons under whom this Defendant claims the same, or how otherwise:—That this Defendant may set forth a full and true List or Schedule of all and every the said several Conveyances and Conveyance, Deeds and Deed, Instruments and Instrument, Wills and Will, Copies and Copy of Wills and a Will, Abstracts and Abstract, Papers and Writings, and the Names of the Parties thereto, and the Dates and short and material Contents thereof:—That this Defendant may set forth a full and true account or description and particular of all the Tithes which were conveyed and passed, or which were intended to be conveyed or to pass by each of such several Deeds or Deed, Instruments or Instrument, Wills or Will, and Writings or Writing, in the words and figures thereof; and in which of such Deeds or Deed, Instruments or Instrument, Wills or Will, and Writings or Writing, the Tithes demanded by this Defendant by the said Bill, or any parts or part of such Tithes, are or is mentioned or comprised, and in which of them such Tithes and each and every part thereof, or some and what parts or part thereof, are or is not

mentioned or comprised, or are or is omitted, or are or is reserved or conveyed to some Person or Persons, and whom by name:—Whether this Defendant ought not to set forth such several particulars; and if not, why not:—Whether he does not, and why, refuse so to do:—Whether for some and what short time previous to the 6th day of August 1579, or at some other and what time Sir *George Calverley*, Knt. *George Cotton*, *Hugh Chulmerly*, *Henry Manwaringe*, *John Nathall*, *Richard Hurleston*, and *Thomas Legh*, one of the Ancestors of this Defendant, or some and which of them, or some other and what Persons were not seised of or otherwise well entitled to the said Improprate Rectory or Parsonage, in Fee-simple, as Joint-tenants, or how otherwise; or whether the said Indenture or Instrument in the said Bill of Complaint mentioned to bear date the 6th day of August 1579, or some other and what Indenture or Instrument of some other and what date, was not duly made and executed by and between such Parties, and was not of such date, purport and effect, as is in the said Bill of Complaint in that behalf mentioned; or was not duly made and executed by and between some other and what Parties, and of some other and what purport and effect; and whether the said last-mentioned Indenture or Instrument, or some Copy or Abstract thereof or Extract therefrom, is not now or was not lately, and when last in the Possession or Power of this Defendant; and that this Defendant may set forth so much and such part of the said last-mentioned Indenture or Instrument as relates to the Conveyance of the Tithes of the said Parish, and also so much of the said Indenture or Instrument as relates to the Exception and Reservation of the said Tithes of any part of the

1819.

GLEGG

v.

LEGH.

1819.

GLEGG

v.

LEGH.

said Parish, in the words and figures thereof:—That this Defendant may produce the said last-mentioned Indenture or Instrument to the said Plaintiff, or leave the same in the hands of his Clerk in Court, for the usual purposes:—Whether the said *George Calverley*, *George Cotton*, *Hugh Cholmerly*, *Henry Mainwaringe*, *John Nathall*, and *Richard Hurleston*, or some one and which of them did not survive the said *Thomas Legh*; and whether thereby, or by some and what means the said Tithes of *Chelford* and *Asthall*, or of some other and what Places in the said Parish, or some and what part thereof, are not become vested in such Survivors or Survivor, or how otherwise:—Whether the said Tithes of *Chelford* and *Asthall*, or of such Places, or any and what part thereof, have or has ever at any time since been well and sufficiently conveyed to this Defendant, or those under whom he claims the said Improprate Rectory; and if yes, when and how, and by what Deeds or Deed, or Instruments or Instrument:—Whether this Defendant has not now, or had not lately or at some and what time or times, and when last in his Possession or Power, divers or some and what Conveyances or Conveyance, Instruments or Instrument, Deeds or Deed, Abstracts or Abstract, Copies or Copy of Deeds or a Deed, Extracts or Extract of Deeds or a Deed, Papers and Writings or a Paper or Writing, by which appears or which would tend to show, and whether the fact is not, that the Tithes of the said Townships of *Chelford*, *Rainow*, *Bosley*, *Old Withington* and *Lower Withington*, or of some and which of them, or some and what parts or part of such Tithes have or has been severed from the said Improprate Rectory or Parsonage, and conveyed to some other Person or Persons than this

1819.

GLEGG
v.
LEGG.

Defendant, or those under whom he claims, or that the legal Estate, Title and Interest in the said last-mentioned Tithes, or in some parts or part thereof, is vested in some other Person or Persons than the Defendant:— That this Defendant may set forth a full true and particular List or Schedule of all and every the said last-mentioned Conveyances and Conveyance, Instruments and Instrument, Deeds and Deed, Abstracts and Abstract, Copies and Copy of Deeds and a Deed, Papers and Writings, and in whose Possession or Power the same and each and every of them are or is, or were or was, when this Defendant last saw or heard of the same:— That this Defendant may also set forth the Dates, Parties and Names, and short and material Contents of all and each and every of the said last-mentioned Conveyances, Instruments, Deeds, Abstracts, Copies of Deeds, Papers and Writings:—Whether the said *Charles Legh*, having some and what Power or Authority so to do, did not, by his last Will and Testament, bearing date the 28th day of January 1778, or in some other and what way, well and effectually, or in some and what way, give and devise unto *John Townshend* and *William Tatton*, or unto some other and what Person or Persons, amongst other things, all and every the said Improprate Rectory and Parsonage, and the Tithes of the said Parish of *Prestbury*, so far as he was entitled thereto, or some and what part thereof, to hold the same to the said *John Townshend* and *William Tatton*, their Executors, Administrators and Assigns, for the Term of 400 years, or for some other and what Term, to be computed from the day of the death of the said *Charles Legh*, or from some other and what time, subject as is in the said Bill of Complaint in that behalf mentioned, or in some other and what manner:—Whether the said Term

1819.

GLEGG

v.

LEGH.

of 400 years is not still outstanding, or how and when and by whom the same has been satisfied and got in; and whether the said Term of 400 years, is by any means, and how, vested in the said Defendant:—Whether divers or some and what long Terms or Term of years in the said Improprate Rectory or Parsonage, or in the Tithes of the said Townships of *Rainow, Bosley, Old Withington, Lower Withington, and Chelford*, or of some and which of them, or in some and what parts or part thereof, were or was not created, vested or attempted to be created and vested in different, or some and what Persons or Person, by the several Deeds or Instruments, or Deed or Instrument, whereby the said several Annuities of 500*l.* and 100*l.* were charged upon the Premises, or some and what parts or part thereof, for *Hester Legh*, in the said Bill named, or whereby the said Annuity or Provision was charged upon the said Premises, or some and what part thereof, for *Mary Legh*, Widow, in the said Bill also mentioned, or whereby the said Sum of 3,000*l.*, and the Interest thereof, was charged upon the said Premises, or some and what part thereof, for *Elizabeth Rowles*, in the said Bill also named, and her Issue:—That this Defendant may set forth the Dates, Parties Names, and short and material Contents of the said several Deeds and Instruments, and the Tithes or Modus, and Compositions for Tithes in the said Parish, thereby conveyed or attempted to be conveyed, in the words and figures thereof, whereby the said several Annuities to the said *Hester Legh*, the said Annuity or Provision to the said *Mary Legh*, and the said Sum of 3,000*l.*, and the Interest, to the said *Elizabeth Rowles*, were respectively given or secured:—Whether this Defendant hath not now, or had not lately, or at some

and what time, and when last in his Possession or Power, all, or some or one, and which of the said several last-mentioned Deeds or Instruments, or some Copies or Copy thereof, or of some or one, and which of them, or some Extracts or Extract therefrom, or from some or one, and which of them; or whether he doth not know where the same and each and every of them are or is, or what are or is become thereof:—Whether this Defendant has not now, or had not lately, or at some and what times or time, and when last in his Possession or Power, divers, or some and what Settlements or Settlements, Deeds or Deed, Wills or Will, Leases or Lease, or some Copies or Copy thereof, or of some or one, and which of them, or some Extracts or Extract therefrom, or from some or one, and which of them, whereby it appears, or which would tend to show, and whether the truth is not, that there are divers, or some and what outstanding Terms or Term, by which the said Improprate Rectory or Parsonage, or the Tithes of the said Townships of *Chelford*, *Rainow*, *Bosley*, *Old Withington*, and *Lower Withington*, or some and which of them, or some and what part of them, or of some and which of them, are or is vested in divers Persons, other than this Defendant; and that this Defendant may set forth by what Deeds or Deed, Instruments or Instrument, Wills or Will, such Terms, and each and every of them, were or was created, and the Dates, Parties Names, and short and material Contents thereof, all such last-mentioned Deeds or Instruments, and the particulars of the Premises demised or attempted to be demised thereby, in the words and figures thereof, and in whom by name such last-mentioned Terms, and each and every of them, are or is now vested, and for

1819.

GLEGG

v.

LEGG.

1819.

GLASS

v.

LEON.

whose benefit, and for what purpose or purposes; and whether this Defendant has not now, or had not lately, or at some and what time, and when last in his Custody, Possession or Power, divers, or some and what Family Settlements or Settlement, Mortgages or Mortgage, and Leases or a Lease of the Tithes of the said Parish of *Prestbury*, or of some and what parts or part thereof, which were made or executed by some of the several Persons under whom this Defendant, *Richard Legh*, claims the said Improprate Rectory, or which purport to be Settlements or a Settlement, Mortgages or a Mortgage, Leases or a Lease of the said Improprate Rectory, and of the Tithes which such Persons or Person were or was entitled to, or claimed to be entitled to in the said Parish of *Prestbury*, or of some parts thereof; and whether in such Settlements or Settlement, Mortgages or Mortgage, Leases or a Lease, or some or one and which of them the Tithes demanded by this Defendant, by his said Bill, or some Compositions or Moduses, or some Composition or Modus, in lieu thereof, or of some parts or part thereof, are or is not mentioned or conveyed, or are or is not reserved to some other Person or Persons than this Defendant, or those under whom he claims the said Rectory; and whether it would not by such Settlements or Settlement, Mortgages or Mortgage, Leases or Lease, or by some or one and which of them appear, or whether they or some or one, and which of them, would not be Evidence to show, or whether they or some or one, and which of them, would not tend to show that the Lands belonging to, and held or occupied by the said Complainant within the said Townships of *Chetford*, *Rainow*, *Besley*, *Old Withington*, and *Lower Withington*, or some

and which of them are exempt from the payment of the Tithes demanded in and by the Defendant's said Bill, or from some and which of them; or that this Defendant is not entitled to the said last-mentioned Tithes, or to some and which of them; and that this Defendant may set forth the Dates, Parties Names, and particular and short and material Contents of the said several Family Settlements, Mortgages, Leases, Deeds, Evidences and Writings, and also the Tithes that are demised or conveyed thereby, or attempted to be demised or conveyed thereby, or as are mentioned or comprised therein, and in each of them, in the words and figures thereof; and whether such Applications as are in the said Bill of Complaint in that behalf mentioned, or some and which of them, or some other and what Applications or Application, have or has not been made by or on the behalf of the said Complainant to this Defendant; and whether he has not and why refused to comply therewith; and whether this Defendant was, in and previously to the month of December 1815, or at any other time in particular, or whether he is now entitled to have, receive, and take, from the Occupiers of the several Farms and Lands lying within the said Township of *Old Withington*, and from each of them, all Tithes of Hay yearly arising, growing, renewing, and increasing upon, from or out of the several Farms and Lands in their respective Occupations, or a full Satisfaction in lieu thereof; and if yes, how this Defendant makes out and derives such Title, he, this Defendant, doth demur, and for cause of Demurrer sheweth, that the said Complainant hath not, by his said Bill, made such a Case as entitles him, in a Court of Equity, to any Discovery from this Defendant, as to

1815.

GREGG
v.
LEACH.

1819.

GLEGG

v.

LEGH.

the Matters hereinbefore specified, or any of such Matters.—Wherefore, &c.”

Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Spence*, in support of Demurrer:—

In this Case, the Defendant has answered part of the Bill, and demurred as to the rest. A similar Cross Bill was filed in the *Exchequer* against the Defendant, by another Person, of whom he claimed Tithe, to which there was a Demurrer, and it was overruled. That Case is not reported. The Pleadings were exactly the same; this Bill is but a transcript of that.

Mr. *Agar*, and Mr. *Duckworth*, in support of the Bill:—

In that Case, the Demurrer admitted the Facts stated in the Bill; one Fact stated, being, that the right to the Tithes was in another Person, which, if admitted by Answer, would entitle the Plaintiff to relief. On that ground the Demurrer was overruled.

Mr. *Fonblanque*:—

This being a Cross Bill, it ought to have been filed in the Court of *Exchequer*, where the Original Bill was filed.

The VICE-CHANCELLOR:—

There may be weight in that Objection. But have you not waived it by answering part of the Bill?

Mr. *Fonblanque*:—

Supposing that, having answered the Cross Bill, we

are too late in the Objection as to its being filed in this Court, the Question is, whether the Defendant in the Original Bill is entitled, by a Cross Bill, to ask a Discovery of the Title of the Plaintiff in the Original Bill? The Plaintiff, in that Bill, is bound to prove his right to Tithe; can you then, by a Cross Bill, oblige him to discover it? The Plaintiff does not pretend an exemption from Tithes: he must pay them to somebody. If different Persons claimed the Tithes of him, he might file a Bill of Interpleader. The Plaintiff states in his Bill, that the Defendant has documentary Evidence in his possession. Is the Defendant to look through all his Title Deeds, to see if there is any Flaw in his Title? Lord *Redesdale* says, "In general, where the Title of the Defendant is not in privity, but inconsistent with the Title made by the Plaintiff, the Defendant is not bound to discover the Evidence of the Title under which he claims (a)."

1819.

GREGG

v.

LEGH.

The VICE-CHANCELLOR:—

Suppose the Cross Bill had charged, that in January 1800, the Defendant conveyed this portion of the Tithes to *A. B.*; must not the defendant answer that allegation? The Bill here generally alleges there has been a Severance of the Title to the Tithes from the Rectory, and that the Defendant has made a Conveyance of these Tithes.

Mr. *Fonblanque*:—

We should have had no Objection to answer such a Question; but here the Inquiry, as to the Severance, extends to the earliest times.

(a) *Redesd. Tr. Pl.* 154-5, ed. 3.

1819.

GLEGG

v.

LEGH.

In *Parker v. Legh*, the same point as this was before Your Honor, on a Cross Bill filed by another of the Defendants to the Original Bill, and Your Honor allowed the Demurrer.

Mr. Agar, and Mr. Spence, in support of the Demurrer:—

There are several Defendants to the Original Bill, filed by the Defendant in the *Exchequer*. Only three of them have filed Cross Bills. One of these Cross Bills was filed in the Court of *Exchequer*, and the Demurrer was overruled, on the ground stated; another, *Parker v. Legh*, was filed in this Court, and the Demurrer was allowed by Your Honor; the present is the third Cross Bill filed, and the propriety of the Demurrer to this Bill is now to be considered.

If a Rector files a Bill for Tithes, he is bound, on a Cross Bill, to discover whether he has any Papers in his Possession which show that he has no Title to the Tithes. In *Stroud v. Decan* (b), that doctrine was laid down on a Demurrer to a Bill for the Discovery of a Settlement. In *Selby v. Selby* (c), an Ejectment was brought, and a Bill was filed for a Discovery of the Plaintiff's Pedigree, and allowed. A Discovery as to a Case stated for the opinion of Counsel has been compelled (d).

The VICE-CHANCELLOR:—

A Defendant is not protected from answering as to his own admissions of facts, although they were contained in a Case stated by him for the opinion of Counsel.

(b) 1 Ves. Sen. 37.

(c) 4 Bro. C. C. 11.

(d) Vide *Stanhope v. Roberts*, 2 Atk. 214.

Mr. Agar :—

It is said the Defendant must show a Title in the Original Bill; but the Answer to that is, that he may show a *prima facie* Title, at the same time that he has a Deed in his Possession destructive of his Title. If a Vicar files a Bill for Tithes, a Cross Bill may be filed for the Discovery of Papers in his Possession, which may show, that the Rector is entitled to the Tithes. If, in this Case, Papers are produced, it will perhaps appear that there is an Exemption from Tithes, The difficulty the Defendant raises as to the Discovery of the Deeds in his Possession, raises a suspicion that he has Papers which show he has no Title to the Tithes. Where a Title is in litigation, you may always call for a Discovery. In *Gardiner v. Mason* (e), a Defendant referred to a Letter which affected his Title; and on Motion, the Court ordered an inspection by the Plaintiff.

1819.

GLEGG

v.

LEAH.

The VICE-CHANCELLOR :—

I see by my Note of the Judgment in the Case of *Parker v. Legh*, that I expressed a clear Opinion that the Defendant was not bound to discover his Title, or to set forth his Title Deeds, or the Contents of them, but that he would have been bound to answer to a charge, that he had conveyed away the Tithes. If, therefore, that Bill contained such a charge, it is singular that this observation on the part of the Court did not bring it to the attention of Counsel. I cannot allow this Demurrer: but let the Defendant be at liberty to

(e) 4 Bro. C. C. 479.

1819.

GLEGG

v.

LEGH.

amend his Demurrer, and to confine it, if he pleases, to the discovery of Title; and let the Plaintiff be at liberty also to amend his Bill.

Note.—It appearing that there was, in fact, in *Parker v. Legh*, a charge that the Defendant had conveyed away the Tithes, it was agreed that the same Order should be made there, as in this Case.

CHAMPERNOWNE v. SCOTT.

1819.

12th May.

BY the Decree in this Cause, it was referred to the *Master* to take an Account of all the Dealings and Transactions between the Plaintiff and Defendant, and state what was due from either of the Parties to the other of them; but in case he should find any Account settled, that he should not unravel the same, but that either of the Parties should be at liberty to surcharge or falsify any of the Charges or Items therein.

Master may by his Report state the reason why he has disallowed a Claim, although the Decree does not direct him to state any special matter.

The *Master* made his Report, to which the following Exception was taken:

“ For that the said *Master* has, in and by his said Report, certified, that besides the several sums in the 2d Schedule to his Report mentioned, and which he had allowed to the said Defendant in taking the Account of the Dealings and Transactions between the said Defendant and the said Complainant; the said Defendant had also claimed before him to be allowed the sum of 2,500*l.*, being the amount of a Compensation which he the said Defendant alleged he was entitled to receive from the Complainant, in lieu of one-fourth part of the Excess in value of the *Honiton Estate*, or of what would have been the probable proceeds of a resale thereof, beyond the price the said Complainant was to pay for it by Agreement with him the said Defendant, who after purchasing the same on his own Account,

1819.

CHAMPER-
NOWNE
v.
SCOTT.

had agreed to give up the benefit of his Contract with the Vendors to the said Complainant, the Master found to involve questions of a complex kind, as to the nature and effect of various successive Agreements between the said Parties, and other Persons, for the purchase and re-sale of the said Estate, and of certain parts thereof, as well by parol as in writing, touching the facts of which alleged Agreements, or some of them, as well as the legal and equitable consequences thereof, the said Parties were at variance; and that he had disallowed the said Claim of 2,500*l.*, not on the merits of the said questions, but because he was of opinion that the deciding upon the same in the Account referred to him would be highly inconvenient, and beyond the limits of the reference to him, according to what he conceived to be the true intent and meaning of the said Decree, in referring to him the said Account: Whereas the said *Master* ought not to state any such matter in and by his said Report, the same not being referred to him, nor being within the limits of the reference to him, and the insertion thereof in the Report, tends unnecessarily to lengthen the Report in this Cause, and increase expense, and may prejudice the Plaintiff, not only in this Suit, in which the matter so proposed to be reported is not in question, but in any other Suit in which the same matter may be directly in question between the said Plaintiff and Defendant; and if the said *Master* for any reason conceived it material for the purposes of this Suit to report such matter specially, he ought also to have reported the particulars of other Claims, which were made before him by the said Defendant, and which were disallowed, and the reasons why such Claims were disallowed."

Mr. *Bell*, and Mr. *Roupell*, in support of Exceptions :—

1819.

CHAMBER-
NOWNE
v.
SCOTT.

The *Master* was not justified in stating any special matter in his Report; he was not called upon to state why he disallowed the Claim of 2,500*l*. The *Master* has exceeded his Authority.

Mr. *Wilson*, *contra* :—

The *Master* states the reason why he disallowed the Claim—that in case any further Proceedings were instituted respecting it, it might not be supposed the validity of the demand had been considered by the *Master*.

The VICE-CHANCELLOR :—

The *Master* being directed to take an Account of all dealings and transactions between the Plaintiff and Defendant, has disallowed a certain Sum claimed in account by the Defendant. The *Master* has stated, that he disallowed this Sum, not upon the merits, but because the complex nature of the Claim demanded a different mode of investigation from that which could be had before him. The Plaintiff, by his exception, now alleges that the *Master* ought not to have stated the reason for his disallowance, not being called upon by the Decree to state any circumstances specially. If the *Master* had simply disallowed this Claim, it would have appeared as if he meant to conclude the Defendant with respect to it; and it was his duty to state that he did not mean that conclusion.

Exception over-ruled.

1819.

BROOKE v. ———.

27th May.

THE *Vice-Chancellor* held, that if Exceptions taken to the Report of a good Title are overruled, other Objections to the Title cannot be made; but if Exceptions are allowed, and a new Abstract of Title is delivered, further Objections may be brought in.

1819.

Lord KILCOURCY v. LEY.

27th May.

On a Motion for leave to withdraw a Replication and Rules to produce Witnesses, and to amend, Notice must be given, and a special Case made.

IN this Case the *Vice-Chancellor* held, that it is a Motion of Course, to withdraw a Replication, and amend a Bill, unless some further Proceeding has been had in the Cause, or the Plaintiff has undertaken to speed the Cause. In the *Exchequer*, he observed, it was not a Motion of Course, but the Parties must make a special Case; which he thought a very useful practice.

In the present Case, Rules had been given to produce Witnesses, and the Motion was, to withdraw the Replication, and the Rules to produce Witnesses, and for leave to amend, which, *His Honor* said, was a Motion that required Notice, and a special Case.

QUALEY v. QUALEY.

1819.

27th May.

MR. BELL moved, on the part of the Plaintiff, that the Registrar of the Ecclesiastical Court might deliver to the Solicitor or Agent of the Plaintiff, the Will in question in the Cause, in order that it might be produced at the hearing of the Cause, on the Plaintiff giving sufficient Security for its being returned.

An Order to the Registrar of the Ecclesiastical Court to deliver a Will to the Solicitor or Agent of the Plaintiff, that it may be produced on the hearing of the Cause, must be directed "To the Registrar of the Court;" and the Security for the return of the Will should be approved by the Master.

A Question was made, whether the Security should be approved by the *Master*, or the Officer of the Ecclesiastical Court, and how the Order should be directed? The precedents were not uniform.

The VICE-CHANCELLOR:—

The Security should be approved by the *Master*, because over his opinion the Court has jurisdiction; and the Order ought to be directed generally "To the Registrar of the Court;" because it will be sufficiently certain to be enforced, and will yet apply in case there should be a change in the Office before the Order is executed.

1819.

11th June.

WHITE v. LISLE and others.

By Original Bill and Bills of Revivor.

On an Issue directed to ascertain whether a Modus was payable in respect of a certain part of a Farm, a Verdict was found for the Defendant in Equity. A new Trial being moved for, the following points were determined:
1st, That the Issue was irregular, it being double in its nature, applying first to the

THIS was a Bill for Tithes, exhibited 4th Dec. 1813, by the Rector of Wootton, in the Isle of Wight, against Charles Lisle and John Hollis, the Proprietor and Occupiers of certain Lands in the parish of Wootton.

The substance of the Defence made by the Answers, was, that the Lands in question were part of an ancient Farm, called Wootton Farm, containing 763 A. O. R. 1 P., situate in the Parishes of Wootton, Whippingham, and Arretton, and that 632 A. 2 R. 21 P. (being part woodland and part arable) were situate in the Parish of Wootton, and were distinguished from the other part of the Farm by well-known metes and boundaries; and

Farm, which the Modus was intended to cover; next, to the Payment contended for as a Modus. 2dly, That the rejection of evidence of a Lease in 1704 was immaterial, as it only carried back some few years farther the fact of Payments, which had been established for a period sufficiently long by other evidence. And, semble, that reputation in this Case was not evidence, and therefore the Lease was not, it being in effect the Declaration of the Lessor of his own Right. 3dly, Though the Judge directed the Jury to find specially, that Fattling Park was an addition to the Farm from the old Common, (if they were of that opinion,) and they by the general Verdict found it was an ancient part of the Farm, there was no reason to be dissatisfied with their conclusion, there being only one Witness against that conclusion, whose evidence was obscure, and opposed by other evidence; and it was to be presumed, in the absence of opposing testimony, that the Inclosure had been lawfully made, and so as to give the Land by way of substitution for the right of Common; and though the Verdict might be wrong in form, yet it was right in substance, and the Court would not send it back for a matter of form. 4thly, That the validity of a Farm Modus is not to be tried by a comparison of value with the whole Tithe at any remote period; and that ancient Documents cannot prevail against all proof of Usage, unless they were consistent with each other, and excluded, not the probability, but the possibility, of the Modus. 5thly, That Reputation is admissible in cases of Private Right, where a class or district of Persons was concerned, and is evidence as to a Parochial Modus, but not as to a Farm Modus, or to support a Prescriptive Right, except as to a right of Way. 6thly, Proof of a fixed Payment for a Farm during a long period, even without mention of a Modus, is evidence of a Modus. 7thly, Costs are given when a finding at Law is confirmed.

that a Modus of 4*l.* was payable at Michaelmas in every year for such last-mentioned part of the Farm, in lieu of all Tithes.

1819.

WHITE

v.

LISLE
and others.

At the hearing of the Cause before the *Vice Chancellor*, on the 27th of *January* 1818, the antiquity both of the Payment, and of the Farm in its present dimensions, being disputed, an Issue was directed to try, Whether a Modus of 4*l.* was payable by the Occupiers of such part of a Farm called *Wootton Farm*, situate in the Parishes of *Wootton*, *Whippingham*, and *Arreton*, as was situate in the Parish of *Wootton*, to the Rector, in lieu of Tithes, for such part containing 632 A. 2 R. 21 P. with a direction to indorse any special matter on the *postea*.

Upon the Trial at the *Winchester* Summer Assizes, in 1818, before Mr. Justice *Parke*, a verdict was found for the Defendants in Equity.

And on the first day of Trinity Term 1819, a new Trial was moved for, by

Bell, *Wetherell*, *Ab. Moore*, and *Dowdswell*, for the Rector.

Serjeant *Pell*, *Trower*, *Gazelle*, and *Tinney*, for the Defendants in Equity, opposing.

The Evidence adduced at the Trial, for the Modus, appeared by the Judge's Notes to be that of several aged Witnesses, who swore to the payment of the 4*l.*, and the nonpayment of Tithes, as long as they remem-

1819.

WHITE

v.

LISLE
and others.

bered.—One of them, *Joseph Weeks*, on his cross-examination said, that he had rented *Chillerton Farm*, in the same Parish, containing 400 Acres, and had paid 60*l.* Composition for Tithes, thirty-seven years ago.—Three Receipts by Mr. *Walton*, a former Rector, were in Evidence, one of the 27th *October* 1785, one of 22d *December* 1801, and one of 15th *October* 1803, all acknowledging the 4*l.* as received for a year's Modus from *Wootton Farm*.—A counterpart of a Lease for twenty-one years, dated 29th *September* 1703, from *John Lisle* to *Thomas Jolliffe*, of a Farm, called *Wootton Farm*, in the Parishes of *Wootton*, *Whippingham*, and *Arreton* (not describing the parcels or boundaries), with a Covenant to *Jolliffe* to “pay, during the term, all Dues, Duties, Taxes, and Payments, in respect of the Premises, or any part thereof, to the Queen, Church, and Poor, or any other Person or Persons; except Poultry, Foxes, and except the yearly Composition, Modus, or Pension of 4*l. per annum* to the Minister of *Wootton*.”—This last piece of Evidence was objected to on the part of the Rector; but it was admitted by the Judge as Evidence of Reputation.

As to the Antiquity of the Farm, *William Chiverton* swore, that he had known the Farm forty-six years, and it was always the same. On his cross-examination he said, that a certain Field, called the *Fatting Park*, was always a part of the Farm; that he had never heard of its being taken from the Common.—*Charles Osborn* swore, that he had known the Farm the same as now for forty-four years.—And the present dimensions of the Farm, agreeing with the terms of the Issue, were proved.

For the Rector were produced, an Extract from the Taxation of Pope *Nicholas*, of which the translation follows :

1819.

WHITE

v.

LISLE
and others.

“ Taxation of the Spiritual and Temporal Possessions of the Clergy of the Archdeaconry of *Winchester*.

“ Deanery of the Isle :

“ The Church of *Wodington*, twelve Marks.

“ And there is a Pension in the same of half a Mark.”

2. An *Inquisitio post Mortem*, 5th *Edward III*, and another, 19th *Edward III*, showing, that Persons of the Family of *De Lisle* were Lords of the Manor of *Wootton*.

3. An Extract from the Nona Roll, 15th *Edward III*, showing, that the Ninth of the Corn, Fleeces, and Lambs, of the Parish of *Wodyngton*, in the Deanery of the Island, was worth, in the fourteenth year of that Reign, 2*l*. 3*s*. 3*d*.

4. An Inquisition, extracted from the Registry of the Diocese of *Winchester*, being a Valuation made 27th *August* 1502, of the Parish Church of *Wootton*, and of a Chantry in the Church, by the direction of the Bishop, on a Petition of the Rector, to be permitted, by reason of the poverty of the Church, to hold the Chantry with the Living. This Inquisition finds the Parish Church worth yearly 4*l*. 6*s*. 8*d*.

5. An Extract from the Ecclesiastical Survey, 26th *Henry VIII*. The translation follows :

1819.

Rectory of Wootton :

WHITE
v.
LISLE
and others.

Is valued in the Farm of Lands called	f.	s.	d.
Glebe Lands, together with Tithes and	6.	8.	1½
Oblations, as appears by the said Quaternium (a) - - - - -			
Charges in Procurations, and a certain	0.	4.	7.
annual Pension - - - - -			
And it is worth, clear - - - - -	6.	4.	2½
Tenths thereof - - - - -	0.	12.	5½

It was admitted by the Defendants in Equity, that the Family of *De Lisle* were Patrons of the Living from 1230 to 1589, and the same was proved from 1718 to 1736, and *Thomas Lisle* was admitted to have been Rector from 1736 to 1767.

As to the Antiquity of the Farm, *John Wallace*, who was born in 1734, swore, that he had known *Wootton Farm* from a Child; that he knew the *Fatting Park*, which was about 100 Acres; that it was formerly called *Quaker's Common*, and was all Bushes and Briars when he first knew it. He did not know when any thing was done to it; it was broken up and ploughed; the Briars were burnt. *Farmer Brown*, who lived at the Farm, did this; after they had parted off the level, they made Hedges; it was taken from the Common, and thrown to *Wootton Farm*; it was Common Land, before the Inclosures, which were made when Witness was a

(a) This is a document often referred to in the Survey, not now to be found.

lad. Brown then rented it. As far as Witness knew, the Common was in the Parish of *Wootton*. Before Inclosure, the Cattle used to run there from all parts. On Cross-examination, he said, that it was called *Wootton Common*, before *Quaker's Common*; that he had mentioned only *Wootton Common*, when in his examination before the Commissioners, (that is, in the original Cause;) that the rest of *Wootton Common* was inclosed.

1819.

WHITE
v.
LISLE
and others:

Robert Knight swore that the Glebe was 170 Acres.

The Examination of *James Fbay*, a Witness in the original Cause, was read, by which he deposed, that the Farm now comprises certain Lands called the *Fatting Park*, and he believed the same were formerly open, barren, and uncultivated Lands, and the reason of his belief was, that he had heard one Farmer *Brown*, who about fifty-six years since was tenant of the Farm, with whom the Deponent then lived as Servant at the Farm, and who had been dead many years, declare, that he, *Brown*, broke up the *Fatting Park*, and brought it into cultivation; that before that time, it was rough, uncultivated Land, covered with bushes, heath, and rough herbage; that it contained about 80 Acres and upwards, and was situate in the Parish of *Wootton*.

John Dyer, aged seventy-three, swore that he knew *Wootton Farm*, and the *Fatting Park*; five pieces bore that name; it was now nearly the same as ever since he remembered, the same kind of Fences; there was a deeper ditch than inner ditches usually are; one ditch was deeper than ditches usually are.

1819.

WHITE

v.

LISLE
and others.

It was then proposed to call evidence to prove the boundary of the Farm by Reputation; the Judge refused to hear the Evidence, as being hearsay Evidence, of a private right, and not Evidence to prove a general Custom.

The Jury found for the Modus, and the Judge certified that he was perfectly satisfied with the Verdict.

Against the Verdict, it was contended, 1st, That the Lease of 1704 was improperly received in Evidence: 2d, That the Judge, in his charge to the Jury, did not lay sufficient stress on the documentary Evidence, and that that Evidence was so strong as to entitle the Rector to a Verdict: 3d, That the Evidence of Reputation, as to the ancient boundary of the Farm, should have been received: 4th, That, inasmuch as the *Fatting Park* appeared to have been taken out of the Common, and added to the Farm within time of Memory, the Verdict finding that the Modus covered the whole Farm in its present dimensions, could not be supported.

1st. On the first point, *Clarkson v. Woodhouse*, 5th Term Rep. 412, n. was cited for the Defendants in Equity; but this point was not much pressed on that side; it was contended, for the Rector, that it had materially weighed with the Jury.

2d. On the second point, it would be necessary to state the Judge's Observations, which were read from a Shorthand Writer's Copy, and were of considerable length. He spoke of the Nona Roll, as a document with which he was previously unacquainted; and stated

that the ancient Surveys could not be relied upon for value, because of the Interest there was to make them low; and that in this Case they afforded mere inference, even as to value.

1819.
WHITE
v.
LISLE
and others.

It was contended for the Rector, that the value of the whole Rectory appeared to be so little as to make it impossible that the district in question, there being much other titheable Land, beside a large Glebe, should then pay 4*l.*; the fact that these *Lisles*, who were proprietors of the Farm, were Patrons, served to account for the payment of the 4*l.* in later times.

3d. On this point, were cited *Buller's Nisi Prius*, 295; *Morewood v. Wood*, 14 East, 329; *Rex v. Eriswell*, 3 T. R. 707; *Stanley v. White*, 14 East, 332; *Weeks v. Sparke*, 1 Maule & Selw. 679; *Webb v. Petts*, Noy, 44.

The Argument for the Rector was, that the question was not of boundary between private Estates, but between an Estate and a Common, and although it was admitted that the rejected Evidence had been tendered as to the boundary of the Estate, only not as to the Common, yet the two must be considered as connected, and a Court of Equity would send the Case back, if there was a want of a proper proof. That in a question of Farm Modus, Evidence of Reputation was determined to be admissible, by the Case from *Noy*, an authority, though the only one. That, in a Case of Modus, the payment was to be established, and also its Perpetuity, but the Perpetuity of payment could only be proved by Evidence of Reputation, and so also the Antiquity of the Farm, in respect of which the payment was made, but

1819.

WHITE
v.
LISLE
and others.

this would include the question of the boundary. *Modus*, it was said, was, in a sense, a public question, the whole Parish being interested in the provision for the Clergyman; and Evidence of Reputation, even in cases of private right, was (it was contended,) to be admitted where the nature of the Case required it. It was suggested, that the point had arisen in some Case of Abbey Lands, which have acquired the name of *Priors Lands*, and have not paid Tithes, and Viner's Abridgment was referred to (*b*).

4th. On this point, it was contended, that there was evidence to show that the *Fatting Park* had been added to the Farm within reach of memory, and that though on the Authority of *Stockwell v. Terry*, 1 Ves. 118, Lands allotted, with the Incumbent's consent, to an ancient Farm, in lieu of right of Common belonging to the Farm, would be reversed by the former *Modus*, yet it did not here appear that the Rector had been privy; the inclosure might have been made by some agreement amongst the Commoners, without consulting the Rector; it might have been an Approvement under the Statute of *Merton*, 20 Hen. III, c. 4. The *Lisle* family appearing, by the *Inquisitiones post Mortem*, to be Lords of the Manor.

The *Vice-Chancellor* said, that he should not immediately give Judgment, but he would state his impression: The Issue in this Cause was irregular; it was double in its nature, applying first to the Farm, a district which the *Modus* was contended to cover; next, to the

(b) See Viner's Ab. Evidence T. b. 117, Tithes discharged, 12 vol. p. 255. folio edit.

payment contended for as a *Modus*. The new Trial was moved for on the grounds of Evidence having been improperly received, and improperly rejected; of misdirection of the Judge, as to the weight of a part of the Evidence, and of the Verdict being against Evidence. With respect to the Lease of 1704, he thought it immaterial whether it was properly or improperly received, because the Evidence of the Lease only went to carry back some few years farther the fact of payments, which had been established for a period sufficiently long by other Evidence; and it appeared to him therefore that the rejection of that Evidence ought not to have affected the Verdict. If in this Case Reputation was not Evidence, which was the leaning of his opinion, then this Lease was not admissible, being, in effect, the declaration of the Lessor of his own right. If, however, Reputation was Evidence in this Case, then he considered the Lease to be admissible, as being a fact of Reputation. As to the *Fatting Park*, the Judge, of *Nisi Prius*, appeared to have distinctly put it to the Jury, to consider, whether it was an ancient part of the Farm lately brought into tillage, or an addition to the Farm, and to have directed that they should find the latter (if it were their opinion) specially, although he intimated that such finding would not, in his opinion, affect the *Modus*; the general Verdict, therefore, involved a finding, that it was an ancient part of the Farm, and *His Honor* saw no reason to be dissatisfied with that conclusion; the only Evidence strongly adverse to it being that of *Wallis*, which was both obscure and unsatisfactory, and opposed by other Evidence: but if otherwise, it was to be presumed (in the absence of opposing testimony) that the Inclosure had been lawfully made, and so made, as to give the Land by

1819.

WHITE

o.

TABLE
and others.

1819.

WHITE
v.
LISLE
and others.

way of substitution for the right of Common, and to bring the Case within the principle of *Stockwell v. Terry (c)*. If so, though the Verdict might be wrong in form, yet it was right in substance, and a Court of Equity would not send it back for a matter of Form.

As to the Argument, that an Approvement might be presumed, it was not shown that the Proprietors of the Farm had been Lords of the Manor since 1332, a period too remote to ground the presumption contended for.

With respect to the ancient documentary Evidence, it was to be observed, that the validity of a Farm Modus was not to be tried by a comparison of value with the whole Tithe at any remote period, because other motives than those of a pecuniary Bargain might influence a particular Proprietor to make a Grant to the Church; and because the relative state of Cultivation and Produce at the time of the contract could not be ascertained. That ancient Documents could not prevail against all proof of usage, unless they were consistent with each other, and unless the effect of them excluded not the probability, but the possibility, of the Modus. That here the ancient Documents were not consistent, nor did any of them exclude the possibility of the Modus.

The only other question was that of the rejection of the Evidence of Reputation as to the Boundary of the Farm, as not admissible in cases of *individual* right. It was plainly admissible in cases of private right, where a class or district of persons was concerned, as in *Stanley v. White (d)*. *His Honor*, after noticing that it had been

(c) 1. Ves. Sen. 118.

(d)

1819.

WHITE
v.
HOLLIS
and others.

admitted that the rejected Evidence had not been tendered as to the Common, said, it was argued to be receivable; first, as on a question of Modus; secondly, as on a question of Prescription generally. As to the first, reputation was undoubtedly Evidence in the case of a parochial Modus, but with respect to a Farm Modus, the Case in *Noy* stood alone, and was too loose to be relied upon for the present purpose, but it was said that such Evidence afforded the only medium of proof; he thought not, because proof of a fixed payment, for a Farm during a long period, even without mention of a Modus, was Evidence of a Modus; for the payment would be presumed to be according to right. Evidence of reputation was therefore not necessary to support such a Modus; and it could not be used against such a Modus, because in cases of private right evidence of reputation was only admissible in confirmation of actual enjoyment, and not against it. A still larger principle was however contended for, namely, that it was receivable on all questions of prescription. But in late times, he did not find this species of Evidence to have been even tendered in cases of prescription as to individual rights, except as to a right of Way; such a general principle would have been a ready answer in every case in which the question had arisen; but he did not find that it had ever before been stated that by a prescriptive right was meant only a right so remote that the policy of the law permitted it to be established without pleading the grant. That it was admitted, that where the grant was pleaded, no such evidence could be received, although the grant might be pleaded to be lost, and supported from usage alone; and, in principle, there seemed no difference between the two cases. *His Honor*

1819.

WHITE.

v.

HOLLIS
and others.

deferred pronouncing his final Judgment, giving liberty to the Plaintiff in Equity to produce any further Authorities.

On the 25th June 1819, no further Authorities being produced, *His Honor* dismissed the Motion, with Costs; observing, that he gave the Costs, on the grounds that where a finding at Law is confirmed, those who disputed it must pay the Costs; and that the Costs of a Motion dismissed, are not Costs in the Cause.

BAYLEY v. MANSELL.

15th July.

ON a Bill filed for the substitution of new Trustees, a Decree was made accordingly, and for a Conveyance to them. Mr. *Shadwell* suggested, that it would be convenient, by a clause in the Conveyance, to enable the new Trustees to appoint others in their stead, if it should become necessary; but the *Vice-Chancellor* refused to direct the insertion of such a clause, there being no provision to that effect in the Trust-Deed.

ROFFEY v. SHALLCROSS.

1819.

19th July.

A PERSON purchased, under a Decree, Two Sevenths of an Estate, in one Lot. There was a good Title to one One-seventh, but not to the other One-seventh; and upon this, the *Vice-Chancellor* held, that the Purchaser was at liberty to be discharged from the whole of his Purchase.

Mr. *Bell*, for the Purchaser.

Mr. *Heald*, *contra* (c).

(c) The Cases are conflicting on this subject; but it is unnecessary to enumerate them, as they are all stated in Sugd. Vend. & Purch. 246, &c. ed. 5. Lord *Eldon* is there represented to have been of opinion, that where there is a Purchase of two Lots, and no Title can be made to one Lot, the Purchaser is bound to take the Lot to which a good Title can be made, unless there was an understanding that the Purchaser was not to take any of the Lots unless he could obtain them

all; but in an analogous Case, *Ex parte Tilsley*, 22d Jan. 1819, where there was a Purchase of two Lots, under a Sale in Lunacy, and the Biddings were sought to be opened as to one Lot; his Lordship would not suffer the Sale of that one Lot to be opened, unless the other was, except the Purchaser chose to keep the Lot as to which the Bidding was not sought to be opened; because he might not have bought that Lot unless he was to have both.

1819.

BLISS
v.
COLLINS.

The apportioned Rent for this Lot is 40l. per annum.— Lot 3 was thus described: “A Freehold House adjoining the preceding, and communicating thereto, on Lease, with Lot 2, to Mr. *Remmards*, which expires Michaelmas 1831. The apportioned Rent for this Lot is 25l. 5s. *per annum.*” This Lot was not sold.

The Defendant, by his Answer, admitted the Purchase, but objected to the Title.

An Order (20th *January* 1816) was obtained, by consent, for a Reference as to the Title, and an Abstract of Title was left with the *Master*; to which, many objections were made, but they were all overruled by the *Master*, except one; viz. “That by a Deed, 4th May 1805, the Premises were conveyed, subject to a Lease, which would not expire until 1863, whereas the particular for Sale described the Premises sold as subject to a Lease expiring in 1831.” The *Master* accordingly reported, that a good Title could not be made. An Exception was taken to his Report; and on the Hearing, the then *Vice-Chancellor* (a) was of opinion, that the Plaintiff had shown, by Evidence produced before the *Master*, that the Term had been merged in the Freehold, and that there was no objection to the Title on account of the Term.—The Defendant’s Counsel then proceeded to discuss another objection which he had taken to the Title, which the *Master* had overruled, on the ground that it was not an objection to the Title, but to the Conveyance. That objection was, “That the House in

(a) Sir Thomas Plumer.

question is on Lease with another adjoining to one *James Remmands*, at a Rent of 65*l.* 10*s.*, according to the Abstract; and the Particular states the apportioned Rent for the House in question is 40*l.*, and of the adjoining House 25*l.* 5*s.*" The *Vice-Chancellor*, as to this objection, was of opinion it was an objection as to the Title, and not as to the *Conveyance*.

1819.
BLISS
v.
COLLINS.

After the Exception was thus disposed of, the Plaintiff, to remedy the objection, made a Conveyance by Lease and Release, 23d and 24th *March* 1819, to a Trustee, for himself, of the purchased House, and of the apportioned Rent of 40*l.*, part of the entire Rent. This Conveyance was produced before the *Master*, and it was contended before him, that this was a legal apportionment of the Rent; but by his reviewed Report, 14th *May* 1819, he certified that the Plaintiff could not make a good Title. To this Report the following Exception was put in, stating the Report (including the *Master's* Opinion against the Title), and that "the ground upon which the *Master* hath so stated is understood to be, that the Rent is not a legally apportioned Rent; whereas the Plaintiff submits that he hath shown, by certain Indentures of Lease and Release, dated respectively the 23d and 24th *March* 1819, produced before the said *Master*, that the said Rent is a legally apportioned Rent, and that therefore the objection arising out of the Statement aforesaid hath been removed; wherefore the said *Master* ought to have stated by his said Report, that the Plaintiff can make to the Defendant a good Title to the same Estate. In which particular," &c.

This Exception came on now to be argued.

1819.

BLISS

v.

COLLINS.

Mr. *Wilson*, Mr. *Sugden*, and Mr. *Teed*, in support of the Exception.

The *Master* is wrong in his conclusion, that a good Title cannot be made. His Report, as is usual in such Cases, does not state the grounds upon which he is of opinion that a good Title cannot be made, but it is known that the objection is in regard to the apportioned Rent, as to which he is of opinion no good Title can be made.

The particulars of Sale, state as to Lot 2, that "the apportioned Rent for this Lot, is 40*l. per ann.*" The meaning was, that the Purchaser would convey this House with an apportioned Rent. It is Rent Service, and apportionable, and the Conveyance to the Vendee will operate as an apportionment; in *Co. Litt.* 148 a. it is said, "If the Lessor granteth part of the Reversion to a Stranger, the Rent shall be apportioned; for the Rent is incident to the Reversion(*d*)."^(d) Where therefore there is a Conveyance of one of these two Houses, in respect of which two Houses one entire Rent is paid, the Law apportions the Rent, and the Vendee may bring an action for it, and the Jury will apportion the Rent. Here, however, the apportionment of the Rent will be a legal consequence of the Conveyance, and the Vendee may bring an action of Covenant for it, and the intervention of a Jury to settle the apportionment will be unnecessary. In *Collins v. Hardin's* Case, 13 Co. 58, it was argued, that the reservation of the Rent was an entire Contract, and by the act of the Lessee, it cannot

(*d*) See also 2 Inst. 504.

be apportioned, but it was held it might, for that the Rent was incident to the Reversion, and the Reversion is severable, and by consequence the Rent also; and *Sir Edward Coke* concludes this Case thus: "Note well these Cases and Judgments, for they are given upon great reason and consideration; for otherwise great inconvenience would ensue, if by severance of part of the Reversion the entire Rent should be lost; and the Opinion reported by *Serjeant Bendloes*, in Hil. 6 & 7. E. 6, to the contrary, *nihil valet (scil.)* that the Rent in such Case should be lost, because that no Contract can be apportioned; which is not Law; for, 1. A Rent reserved upon a Lease for years, is more than a Contract, for it is a Rent Service: 2. It is incident to the Reversion, which is severable: 3. Upon recovery of part in waste, or upon entry in part for a forfeiture, or-upon surrender of part, the Rent is apportionable."

1819.

BLISS

v.

COLLINS.

In *Stevenson v. Lambert* (e), it was held by *Lord Ellenborough*, that Covenant will lie against the Assignee of part of an Estate for not repairing his part, "for it is dividable, and follows the Land with which the Defendant, as Assignee, is chargeable by the Common Law, or by the statute 32 *Henry VIII*, c. 37"; and in *Twynam v. Pickard* (f), it was determined, that Covenant will lie by the Assignee of the Reversion of part of the demised Premises, against the Lessee, for not repairing.

In *Bacon's Abridgment* (g), *tit. Rent*, which, as to this part of the Work, is well known to have been penned by *Chief Baron Gilbert*, he considers whether a Rent

(e) 2 East, 580.

(f) 2 Barn. & Ald. 105.

(g) Gwillim's edit. 6 vol. p. 48.

1819.

BLISS

v.

COLLINS.

Service, incident to the Reversion, may be apportioned by the grant of part of the Reversion, and holds that it may, and he puts this Case: "If A., possessed of a Term for twenty years, leases it for ten years, reserving 30*l.* Rent, and afterwards A. devises 20*l.* of the Rent to three of his Sons, equally to be divided, this is a good Devise, and each of the Sons shall have an Action of Debt for his third part, though the Reversion to which the Rent was originally incident, remains entire; for there is nothing in the nature of the thing to hinder such a Division or Apportionment; and if the Tenant omits to pay the Rent, the several Actions are a mischief which he brings upon himself, and which he might and ought to have prevented." It is clear, therefore, that by a Conveyance to the Purchaser he will take an apportioned Rent, as stated in the particulars of Sale, and, therefore, that he is bound to complete his Contract.

Mr. Hart, contra:—

According to the particulars of Sale, it must be supposed that the House to be sold, and the apportioned Rent, was a Rent which had already been apportioned. No Rent was apportioned when the Sale took place, or since. On the apportionment of the Rent, the right of entry is gone, that not being divisible⁽¹⁾. There is also a Covenant to insure, and other Covenants in the Lease, which will not be effectual after an Apportionment, and great inconvenience and loss may arise upon the Powers given under the Statutes of the 4 Geo. II, and 11 Geo. II.

(1) Knight's Case, 5 Co. 55 b.; and see what Mr. J. Holroyd says, in Twynam v. Pickard, 2 Barn. & Ald. 112.

Mr. Sugden :—

The severance of the Estate demised does not take away the mutual remedies; besides, all the consequences of an apportioned Rent, the Purchaser must be supposed to be aware of, when he agreed to purchase it.

1819.

BLISS
v.
COLLINS.

I have lately had before me the Conveyances, on the Sale to different Persons, of one of the largest Estates in the Kingdom. Those Conveyances have, by the different Purchasers, been under the observation of the ablest Conveyancers; the Conveyances were of an apportioned Rent, and no doubt was suggested by any Person that the Conveyances were imperfect, because the Lessee was not a Party.

The VICE-CHANCELLOR :—

The Particular under which the Defendant purchased represents the 40 *l. per annum* to be an apportioned Rent for this Lot; and he insists that there not being at the time of the Sale any apportioned Rent, he is not bound to complete his Purchase; the Plaintiff alleges that his Conveyance alone will pass this Property to the Purchaser, with an apportioned Rent of 40 *l.* as legally and effectually as if a Jury had intervened. This is a mere legal question. Let a Case be sent for the Opinion of a Court of Law; viz. Whether the Purchaser of Lot 2, would, by the Conveyance of the Vendor alone, without the concurrence of the Lessee, acquire the same Rights and Remedies against the Lessee, in respect of the apportioned Rent of 40 *l.* therein to be reserved to him, as he would acquire in case no Rent were mentioned in such Conveyance from the Vendor, and the annual Rent of 40 *l.* were legally apportioned by a Jury for that part of the Reversion comprised in Lot 2?

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1819.

GARDINER v. ROWE and others.

13th July.

On a Motion for a Receiver, an Issue directed, and that the Plaintiff and a Defendant should be examined upon the Trial of the Issue.

The Defendants afterwards refused to proceed on the Issue; and it was held, that they could not be compelled to proceed.

ON a Motion for a Receiver, an Issue was directed in this Cause; and a direction was asked, that the Plaintiff and *George Wilkinson*, one of the Defendants, should be ordered to be examined upon the Trial.

The *Vice-Chancellor* had some doubt as to the propriety of such an Order, though he believed it had been made in a Cause of *Harben v. Deane*, not reported.

The Cause stood over to look into the Authorities; and on this day it was stated, that the Order in *Harben v. Deane* was by consent: but that in *Harwood v. Harwood*, 25th January 1806, Reg. Lib. (A), fol. 672, there was, without consent, an Order, that the Plaintiff and Defendant should be examined on the Issue.

The *Vice-Chancellor*, on the Authority of that Case, directed that the Plaintiff and the Defendant *George Wilkinson* should be examined upon the Trial; and the Jury were to be at liberty to endorse any Matter specially.

Mr. *Bell*, Mr. *Rose*, and Mr. *Matthews*, for the Plaintiff.

Mr. *Wetherell*, Mr. *Montagu*, and Mr. *Pepys*, for the Defendants.

The Defendants afterwards declined proceeding on the Issue. An Application was made for a Compulsory Order; but the *Vice-Chancellor* held (as I was informed), that he had no power to compel them to proceed on the Issue.

DANSEY v. BROWNE.

1819.

28th July.

ON a Motion to dissolve the Injunction which had been obtained in this Cause, a reference of the Answer for Impertinence was shown for cause against dissolving the Injunction, and the Party was put upon the usual terms of obtaining the Master's Report in four days. The Report was not obtained within the four days, and, in consequence, the Injunction was dissolved. The Master afterwards reported the Answer was impertinent; and Mr. Bell now moved, upon this Report, to revive the Injunction, and observed, that when on a Motion to revive an Injunction, a reference of an Answer for Insufficiency is shown for cause against dissolving the Injunction, and the Party is put upon the usual terms of obtaining the Master's Report within four days, but the Report is not obtained within that time, the Injunction is dissolved, but that if the Master afterwards reports the Answer to be insufficient, the Plaintiff may move to revive the Injunction; and that, by analogy, the same rule must prevail where an Answer is referred for Impertinence, and the Master reports the same to be impertinent. After the reference is disposed of for Impertinence, the Plaintiff may refer the Answer for Insufficiency, and cannot do it before, *Pellew v. ———* (r), and may show the reference for Insufficiency as cause against dissolving the Injunction.

On the other side, it was contended by Mr. Agar, that a Plaintiff could not apply to revive an Injunction, merely because a Report was obtained that the Answer was *impertinent*, and that no Motion was yet made for

On a Motion to dissolve an Injunction (on the coming in of the Answer) a reference of the Answer for Impertinence was shown for cause against dissolving the same, and the Party was put upon the terms of obtaining the Report within four days. The Report was not obtained within the four days, and the Injunction was dissolved. Afterwards a Report, that the Answer was impertinent, was obtained; and upon that Report a Motion was made to revive the Injunction, and it was held, that such a Motion could not be sustained.

1819.

DANSEY
v.
BROWNE.

expunging of the Impertinence. It is for them to move to expunge the Impertinence, and is the Injunction to be revived, and they at liberty, for an unlimited period, to prevent us moving to dissolve it, upon the Answer, merely because they have not expunged the Impertinence; after which, they may move to refer the Answer for Insufficiency, and show that reference for cause against dissolving the Injunction. This would lead to great oppression. It is not, however, pretended that they mean to refer the Answer for Insufficiency.

The VICE-CHANCELLOR:—

I do not concur in the supposed Analogy between a Reference for Impertinence, and a Reference for Insufficiency. The Analogy applies to the extent, that if a Reference for Impertinence is shown for Cause against dissolving an Injunction, and the Report is to be made within four days, and the Report is not made within that time, the Injunction is dissolved, as it is in the Case of an Answer; but there the Analogy ceases, for if an Answer is reported insufficient, the Party may immediately put in a further Answer, and again move to dissolve the Injunction; but if an Answer is reported *impertinent*, the Defendant has no means of immediately proceeding, but the Defendant is in the power of the Plaintiff, who alone can move to expunge the Impertinence. I think, therefore, you cannot move to revive the Injunction on the ground of the Report of Impertinence; but I shall make inquiry into the Precedents; if none are found, I shall hold that you cannot move to revive the Injunction upon the Report of Impertinence, but that it can only be done on a Report of the Insufficiency of the Answer.

☞ No further mention was made of the Case.

YATES v. FAREBROTHER and another.

1819.

28th July.

THIS was a Bill for a specific Performance against a Vendee, and the Auctioneer, who had a considerable Deposit in his hands was made a Defendant; and the Bill prayed not only a specific Performance, but that the Deposit might be paid into Court. The Auctioneer, by his Answer, expressed his readiness to pay the Deposit into Court, after deducting his claims upon the same.

Bill against Vendee and Auctioneer, praying a specific Performance, and that Deposit may be paid into Court. Auctioneer admits the Deposit to be in his hands, and states his claims upon it. On Motion, he was ordered to pay in the Deposit, after retaining the amount of his claims, and without prejudice to any question as to the Money retained.

Mr. Agar moved, upon the Answer, that the Auctioneer might be ordered to pay the Deposit into Court.

Mr. Treslove, contra:—

There is no instance of such a Prayer in a Bill. If the Order is made, the Auctioneer ought to be allowed to retain his claims upon the Deposit.

The VICE-CHANCELLOR:—

The Auctioneer is a mere Stakeholder, and the Court will secure the Stake pending the Litigation. Let the Defendant pay into Court the Deposit, after deducting the amount of his Claims upon it; but without prejudice to any question as to so much of the Deposit as is retained.

STEADMAN v. ELLIS.

1819.

29th July.

The only Answer that can be given on a Motion to dismiss, is an undertaking to speed the Cause.

MR. NEWLAND moved, after a Replication, to dismiss the Bill for want of Prosecution, observing, that no cause could be shown against the Motion, and that all the Plaintiff could do was to undertake to speed the Cause.

Mr. Wray, contra, was about to state circumstances, to show that there could be no advantage in prosecuting the Suit; but

The *Vice-Chancellor* observed, that no other Answer could be given to the Motion, but an undertaking to speed the Cause; and that if there were any particular circumstances attending the Case, they ought to be the subject of a special Application (o).

(o) In various other Cases the *Vice-Chancellor* has determined in the same manner.

M. T. GIBSON and CHAS. VARNHAM, Plaintiffs,
and

ANN WHITEHEAD, WM. EDWARDS, THOS.
COLLETT, JOHN WHITEHEAD, and Sir B.
HOBHOUSE, Bart. - - - Defendants.

1819.

A BILL was filed by the Plaintiffs, as Assignees of *George Whitehead* the younger, and *Gamsuttel Clarke*, who were stated to be Creditors of *George Whitehead* the elder, deceased, against the Defendants his Executors and Trustees, praying an Account of what was owing to the Plaintiffs as such Assignees; and that the Defendants might admit Assets, or set forth the usual Accounts; and that if the personal Estate of the Testator was not sufficient to answer the Plaintiffs Claim, that the deficiency might be supplied by the Sale of the Testator's real Estates, or a sufficient part thereof; or in case the Court should be of opinion that the real Estates of the Testator were not charged by his Will with the payment of his Debts, then, that it might be declared that the real Estates of the Testator are applicable to the payment of the Plaintiffs Debt, and the other unsatisfied Creditors of the Testator, under and by virtue of the Act of the 47 *Geo. III*, Sess. 2, c. 74, s. 1, and that the necessary directions might be given for making good the deficiency of the personal Estate, by Sale of the Testator's real Estates, or a sufficient part thereof.

30th July.

On a special Application, the Court, where circumstances require it, will give the Defendants leave to plead double.

The Bill did not state the Will at length, but only partially as to other matters, with a reference to the Will
VOL. IV. R

1819.

GIBSON
and another
v.

WHITEHEAD
and others.

when produced; nor was it stated in the Bill, that by the Will, the Testator's real Estates were charged with the payment of his Debts, except that there was a charge, "that in case the personal Estate and Effects of him the said Testator, are not sufficient to pay and satisfy the Plaintiffs said demand, that Plaintiffs are entitled to have same raised and paid out of the real Estates of him the said Testator, under and by virtue of the directions for the payment of his Debts contained in the said Testator's Will; and in case this Court shall be of opinion that the said Testator has not, by his said Will, charged his said real Estates with the payment of his Debts; then Plaintiffs charge, that the Testator *Geo. Whitehead* the elder, was in his life-time, and at the time of his death, a Trader within the meaning of the Bankrupt Laws; and that, under and by virtue of an Act of Parliament passed in the 47th year of the Reign, &c. his the said Testator's real Estates are Assets in Equity, for the payment of his Debts, &c."

To this Bill, the Defendants *Ann Whitehead* and *Wm. Edwards*, put in the following Plea to part of the Bill, together with an Answer as to the rest.

"That Defendants, by Protestation, &c. To all such parts, or so much of said Bill that doth require or call upon Defendants to set forth an Account and Rental of all the real Estates of *Geo. Whitehead* the Testator, in the said Bill mentioned, and where same are situate, and also an Account of all the Rents and Profits thereof received by Defendants and said other Defendants in said Bill in that behalf mentioned, or either of them, during the time they or either of them have or has been in the possession and receipt of the Rents and Profits

thereof, together with the times when, and the Persons from whom, and the particular Estates in respect whereof they or either of them received the same; and that Defendants, and said other Defendants, may set forth whether they have disposed of any and which of the said real Estates of said Testator; and to whom and at what prices, and at what times, and how they have applied and disposed of the Money arising from such Sales and every part thereof; and then prays that it may be declared that the real Estates of him said Testator are applicable to the payment of the Debts of said Plaintiffs, and the other unsatisfied Creditors of him said Testator, under and by virtue of a certain Act of Parliament, made and passed in the 47th year of the Reign of His present Majesty, intituled, "An Act for the more effectually securing the payment of the said Debts of Traders," and in that case all proper and necessary directions may be given for making good the deficiency of the personal Estate of said Testator, by sale of said Testator's real Estates, or a sufficient part thereof;—Do plead thereto, and for Pleas do say and aver, That *George Whitehead* the elder, the Testator in said Bill mentioned, was not, at the time of his death, a Trader within the true intent and meaning of the Laws relating to Bankrupts, and of said Act of Parliament made and passed in the 47th year of the Reign of His present Majesty, intituled, "An Act for the more effectually securing the payment of the Debts of Traders." And Defendants do plead same in bar, to so much of said Plaintiffs Bill, and humbly pray the Judgment of this Court, whether they shall be compelled to put in any further or other Answer to such parts of said Bill as is hereinbefore pleaded."

1819.

GIBSON
and another
v.
WHITEHEAD
and others.

1819.

GIBSON
and another

T.

WHITEHEAD
and others.

The Defendant, *Thomas Collett*, put in the like Plea, together with an Answer. These two Pleas were set down for Argument, and afterwards the Defendant, Sir *B. Hobhouse*, put in an Answer, but did not plead. In his Answer, however, he denied that the Testator was a Trader at the time of his Death.

Mr. *Hart*, Mr. *Bell*, and Mr. *Rose*, in support of the Plea:—

This Plea is a sufficient bar to the discovery and relief sought as to the Testator's real Estates. The Plaintiffs have not set forth the whole of the Will in their Bill; if they had, it would have appeared that the Testator has not thereby subjected his real Estate to the payment of his Debts. The Bill does not state, except in the charging part, that the Testator by his Will subjected his real Estates to the payment of his Debts. The Will is here, and the Court referring to it will see that the real Estates are not so charged. If these Defendants had pleaded, First, That the Testator's Will did not subject his real Estates to the payment of his Debts; and, Secondly, That the Testator was not a Trader at the time of his death, the Plea would have been double and bad.

The VICE-CHANCELLOR [stopping the Defendant's Counsel]:—

This is a Bill by Simple-Contract Creditors, to charge the real Estates of a deceased Debtor, alleging, First, That the Testator by his Will rendered his real Estates subject to the payment of all his Debts; and, Secondly, That if that is not the true construction of his Will, then, under the Act of Parliament, his real Estates are liable, he having been a Trader at the time of his

1819.

GIBSON
and another
v.
WHITEHEAD
and others.

death. Three of the Defendants plead that the Testator was not a Trader at the time of his death. The Plea is not an Answer to the whole Bill, for it only negatives the statement that the Testator was a Trader, but not the Allegation that by his Will he charged his real Estates with the payment of his Debts. It is, however, urged, that as the Bill refers to the Will, the Court may look at it; and will conclude from thence, that the real Estates are not charged with Debts. If the Bill had professed to state the Will at length, and not the effect of it only, the Court might have come to the conclusion that the real Estate was not charged with the Debts, and that the Plea was therefore an Answer to the whole Bill. But where is the Court to find the instrument which it can judicially call the Will? The Probate is not Evidence as to a Will of real Estate. Considerable inconvenience may be occasioned by the framing of a Bill in the way this is drawn, so as to preclude a defence by Plea. In the Common Law Courts, a Defendant may, on many occasions, plead several Pleas (*p*); but in this Court the ordinary practice does not admit a double Plea. Where, however, great inconvenience would be sustained, as, where long Accounts must be set forth, in consequence of not being able to plead a double Plea, the Court would, I think, on a special Application, give leave to file it. I do not remember such an Application to the Court, but I see no objection to it. The Plea, as it stands at present, cannot be sustained, but you may, on *Monday*, apply for leave to file a double Plea.

(*p*) At Law a Plea *in bar* on Plead. 446,] cannot be
[Co. Litt. 304 a.; Tidd. Pract. double; but the 4 & 5 Anne,
586; 1 Chitty on Pleading, c. 16, permits, in some cases,
511,] or *in abatement* [1 Chitty a double Plea.

1819.

2d August.

GIBSON
and another
v.

WHITEHEAD
and others.

2d August.—On this day a special Motion was accordingly made by Mr. *Bell* and Mr. *Rose*, “ That the Defendants, or any of them, may be at liberty to plead in this Cause, First, the Will of *Geo. Whitehead* the Testator, in the Pleadings mentioned, bearing date the 19th of April 1817, and the Codicil thereto, bearing date the 28th June 1817; and that he did not thereby, or by either of them, charge his real Estate with, or subject the same to, the payment of his Debts, or the Plaintiffs demand in this Cause; and, Second, That the said *Geo. Whitehead* was not, at the time of his death, a Trader within the true intent and meaning of the Bankrupt Laws relating to Bankrupts, and of the Act of Parliament made and passed in the 47th year, &c.”

The Motion was not opposed, and His *Honor* made an Order accordingly.

KING v. ALLEN.

1819.

4th August.

THIS was a Bill of Discovery in aid of an Action, and Mr. *Shadwell* now moved, before Answer, for a Commission abroad to examine Witnesses.

The VICE-CHANCELLOR:—

You cannot make this Motion, unless the Defendant is in contempt, or has answered. Until the Defendant has answered, there is no Issue tendered in the Cause, nor any matter in dispute between the Parties; and previous Depositions are therefore considered in the nature of voluntary Affidavits. But if the Defendant be in contempt, the Plaintiff shall, notwithstanding, have his Commission; for otherwise he might lose his testimony by the default of the Defendant.

1819.

4th August.

HIBBERSON v. COOKE and another.

A MOTION had been made by the Defendants to dismiss the Bill for want of Prosecution, and Mr. *Shadwell* undertook to speed the Cause. According to the Note in the Registrar's Book, Mr. *Shadwell* undertook to speed, not in this Cause, but in a Cause of *Hibbert v. Hibbert*; but this was a mistake of the Registrar. The Order of Dismissal was drawn up by the Defendants.

Mr. *Shadwell* now moved, upon an Affidavit of the circumstances of the mistake, to set aside the Order.

The only question was, as to Costs.

The VICE-CHANCELLOR:—

Between two innocent Parties, he who is in possession of the Order must be indemnified. Your Client must pay the Costs of drawing up the Order, and of the present Application.

Ex parte COOMBE and another, *in re* BEAVAN.

1819.

11th August.

THE object of the Petition in this Case was to have certain Premises sold, in respect of which the Petitioners claimed to have an equitable Mortgage; and if on the Sale sufficient should not be produced to pay the Debt, in respect of which the Mortgage was made, to be allowed to prove the residue under the Commission.

A parol Agreement to deposit a Lease when granted, as Security for a Sum advanced, does not constitute an equitable Mortgage.

On the 1st *January* 1817 a Lease was granted of the Premises in question to one *Buckland*, to hold to him from the 6th *April* 1818, when a former Lease would expire, for the term of twenty-one years. *Beavan*, the Bankrupt, being desirous of purchasing this Lease of *Buckland*, applied to the Petitioners for a Loan of 870*l.*, which they agreed to advance upon having a Deposit of the Lease so to be purchased, by way of Security for the repayment of the Money. The Money was accordingly advanced, the Lease was assigned to *Beavan* on payment of 1,000*l.*, and he deposited it with the Petitioners. *Beavan* gave also a Warrant of Attorney to the Petitioners, as a further Security; and in the Warrant of Attorney the Deposit of the Lease, and the object of such Deposit was stated to be, not only as a Security for the 870*l.* and Interest, but for such further Debt as might become due, provided the same, together with the 870*l.* and Interest, did not exceed 1,000*l.*

1819.

Ex parte
COOMBE
and another,
in re
BEAVAN.

In *August* 1818, *Beavan*, being desirous of obtaining a further term of nineteen years in the Premises, applied to the Petitioners to lend him the further sum of 200*l.* to enable him to procure such Lease. They consented to advance the Money, and it was agreed that the Lease for such further term (when the same should be executed) should be deposited with the Petitioners for securing the repayment of the 200*l.*, as well as of the Debt then due or which should accrue due. The 200*l.* was accordingly advanced in *August* 1818.

In *March* 1819, *Beavan* applied to the Petitioners for a further sum of 150*l.* to enable him to pay for Repairs, in order to obtain the further Lease. This sum they advanced on the 29th *March* 1819, and it was agreed the further Lease should be charged with that sum also.

In *April*, in the same year, *Beavan* again applied to the Petitioners, representing that the Lease was prepared; but that a Premium or Fine of 110*l.* was to be paid prior to the execution of the same, and requesting the Petitioners to advance that Sum. This Sum also they advanced; and it was agreed, that the intended Lease, when executed, should be delivered by the Duke of *Portland's* Solicitor to the Petitioners, as a pledge for the repayment of the several Sums and Interests advanced by the Petitioners as before mentioned. The Lease was afterwards executed, and remained in the hands of the Duke of *Portland's* Solicitor.

A Commission of Bankrupt issued against *Beavan* on the 26th *June* 1819.

The whole of the several Sums so advanced, together with the Interest, and a Debt of 20*l.* for Beer, remained due at the time of the Bankruptcy.

1819.
—
Ex parte
COOMBE
and another,
in re
BEAVAN.

It was admitted, that the Deposit of the first Lease was a good equitable Mortgage to the amount of 1,000*l.*; but it was contended, that the further Lease could not, under the circumstances, be considered as subject to an equitable Mortgage, and *Ex parte Hooper* (q) was cited.

Mr. *Wingfield*, and Mr. *Coombe*, for the Petitioner.

Mr. *Wilson*, for the Respondents.

The VICE-CHANCELLOR :—

A good equitable Mortgage was made by the deposit of the original Lease, but the parol Agreement to deposit the further Lease can give no title to the Petitioners. The Prayer of the Petition must be granted, so far as relates to the original Lease; and the Petition dismissed as to the further Lease.

(q) 1 Meriv. 7.

1819.

ANONYMOUS.

8th April.

A Stranger to the Record cannot move to refer a Bill for Scandal. **MR. RAITHBY**, on behalf of Mr. ———, a Solicitor, who was not a Party to the Cause, moved to refer a Bill for Scandal.

The VICE-CHANCELLOR :—

No Application can be made by a Stranger to the Record, to refer a Bill for Scandal. In order to decide upon the Scandal, the *Master* must be attended with an Office-copy of the Bill; but a Stranger to the Record has no right to take an Office-copy of the Bill; and the Order, if made, might be ineffectual. Besides, the Party injured does not require the aid of this Court to remedy the injury done to him, he has his Action at Law; for if a Bill in this Court is made the vehicle of a Libel, the Party libelled by the Record may proceed at Common Law, as on any other Writing. I have conversed on this subject with the *Lord Chancellor*, and he concurs in the Opinion which I have expressed.

— v. HARRISON and others.

20th April.

A BILL was filed, stating a Partnership, and praying an Account.

The Defendants, by their Answer, denied the Partnership, and refused to set forth any Account.

Exceptions were taken to the Answer, for insufficiency, in not having set forth the Accounts.

The VICE-CHANCELLOR :—

That point is settled. If a Defendant answers, he must answer fully (a). They should have pleaded.

Exceptions allowed.

ROCK v. HARDMAN.

THE Bill was filed for the administration of a Testator's Estate. The Executors, the Defendants, in pursuance of an Order, paid the Balance found due from them into Court, and it was laid out in the 3 per Cents; some of the Legatees being Infants, a reference was made to the *Master*, to compute how much Stock it would be necessary to be set apart to answer the Legatees. The *Master* made his Report accordingly, but before any Order was made on that Report one of Infants came of Age, and petitioned for his Legacy; and the price of Stock having fallen, the question was,

1819.

22d April.

(a) See *ante* Mazarredo v. Maitland, 3 vol. p. 70. This seems now to be the general rule: but there are exceptions; for a Defendant may, by Answer, refuse to answer as to what may subject him to a penalty; Neline and others v. Newton, before Vice-Chancellor Leach, 23d April 1819, MS., or as to any thing which may *criminate* him. Curzon v. De la Zouch, 1 Swanst. 192.

1819.

Rock
v.
HARDMAN.

whether he was to take the quantity of Stock mentioned by the *Master* in his Report, or so much Stock as would *now* be sufficient to answer the Legacy.

The *Vice-Chancellor* said, that if an Order had been made upon the *Master's* Report to set apart the Stock during the Infancy, it would have concluded the amount of the Legacy; but that the reference to the *Master* was to enable the Court to act upon the interest of the Infants if it should become necessary. That the determination of the Infancy rendered the *Master's* Report nugatory as to that particular Legatee, and that he was entitled to be paid his full Legacy.

SHEPHARD v. ELLIOT.

29th April.

THE Bill was filed against a Mortgagee in Possession to redeem. The Interest had never been in arrear, and the annual Rents exceeded the amount of the annual Interest payable on the Mortgage.

On the hearing of the Cause, a question was made, whether the *Master* ought to be directed to make *Rests*, on taking of the Account.

THE VICE CHANCELLOR:—

In this Case, the Account must be directed with *Rests*, in order that the Excess of Rent beyond the Interest may be applied in sinking the Principal. The Court sometimes relaxes this Rule, where the Interest is in arrear when the Mortgagee takes possession.

— v. —

AN Issue was directed to be tried at *Chester*. The Issue was not tried, nor was any Notice of Trial given.

1819.
7th May.

A Motion was now made, that the Plaintiff might be directed to try the Issue at the next *Chester Assizes*, or otherwise, that it might be taken *pro confesso*. Notice of this Motion was given, and an Affidavit of that Fact was produced; and nobody appearing on behalf of the Defendant, the *Vice-Chancellor* made the Order.

BOTT v. BIRCH.

THIS was a Motion for an Injunction to stay proceedings at Law, upon Equity confessed in the Answer.

7th May.

The Answer admitted the written Agreement charged in the Bill, upon which the Equity was founded; but alleged, that the true intention of the Parties was otherwise.

The *Vice Chancellor* said, that on such an Application the Answer was Evidence for the Defendant as to all Facts to which other Testimony could be received; that other Evidence could not be received, to contradict the written Agreement; and therefore the Answer could have no weight for that purpose.

Injunction granted.

1819.

Ex parte STEVENS, in re AUBERT.

9th May.

Query, Whether an Insurance Broker can be made a Bankrupt? Affidavits filed in support of a Petition to supersede a Commission and stay a Certificate, need not be answered if founded only on information and belief; unless it is stated in the Affidavit from whom the information was received, and that such Person refuses to make an Affidavit.

When a Petition is to supersede a Commission, for Collusion, and stay a Certificate, and there are suspicious circumstances, Costs will not be given, though the Petition fails.

THIS was a Petition, by a Judgment Creditor, who had not proved under the Commission, to supersede the same; or, if the Commission should be considered as valid, to stay the Bankrupt's Certificate.

The grounds on which the Commission was sought to be superseded, were, 1st, That *Aubert* was not such a Trader, against whom a Commission could issue, he being an *Insurance Broker*, and described as such in the Commission. 2dly, That the Commission was concerted between the Bankrupt, the Petitioning Creditor, and the Attornies who sued out the Commission.

To prove that the Commission was concerted, Affidavits were filed, stating, That *Aubert* was in custody at the Suit of the Petitioner, when the Commission was taken out:—That the Solicitors to the Commission, or one of them, were or was daily, before and at the suing out of the Commission, in the habit of calling upon the Bankrupt whilst so in Custody:—That the Petitioning Creditor was the particular Friend of *Aubert*; and that *Aubert* was not indebted to him, or indebted only in respect of Stock-jobbing transactions:—That on inquiry at *Aubert's* House, the Maid informed the Deponent that no Sale had taken place, and that no Person was in Possession, except *Aubert*.

In order to stay the Certificate, an Affidavit was also made by the Petitioner, stating her belief, that *Aubert*

had, within twelve months last past, lost considerably more than 100*l.* in Stock-jobbing Transactions, called Bargains for Time, in which Transactions, no Stock bought or sold was actually transferred or delivered.

No Affidavits were filed in answer.

Mr. *Bell*, and Mr. *Maddock*, in support of the Petition:—

The first question, is, Whether an Insurance Broker can be made a Bankrupt? That point has never yet been decided, and it is a strong circumstance to show that they cannot. The 5th Geo. II, cap. 30, s. 39, runs thus: "Whereas persons dealing as Bankers, Brokers and Factors, are frequently entrusted with great sums of Money, and with Goods and Effects of very great value, belonging to other Persons, it is hereby enacted, that such Bankers, Brokers and Factors shall be and are hereby declared to be subject and liable to this and other the Statutes made concerning Bankrupts." But an Insurance Broker is not intrusted with Monies, &c. All his office consists in obtaining signatures to a Policy of Insurance, which, when obtained, he gives to his Employer, who then pays him the Premium for which the Policy was effected, and a further Premium for his trouble in procuring the Policy. No Money is entrusted to him; he is not, therefore, within the Act, which applies only to Stock-brokers and Pawn-brokers; the former being frequently entrusted with great sums of Money, and the latter with Goods and Effects of great value.

With respect to the second point, of its being a concerted Commission; the Affidavits are not denied, and

VOL. IV. S

1819.

Ex parte
STEVENS,
in re
AUBERT.

1819.

Ex parte
STEVENS,
in re
AUBERT.

therefore must be taken as admitted; and if admitted, they establish the concert in taking out of the Commission, and the want of a sufficient Debt to support the Commission.

As to the third point, the invalidity of the Certificate; if the Commission is superseded, there is an end of the Certificate; but if the Court thinks the Commission can stand, then, as the Bankrupt is silent, and does not deny that he has lost 100*l.* in Stock-jobbing Transactions, that fact must be considered as admitted, and the Certificate is invalid.

Mr. Heald, and Mr. Montagu, contra:—

There may not be any decision in print, that an Insurance Broker cannot be made a Bankrupt; but there have been such Commissions, and no Objection taken. They are within the Act of the 5 Geo. II. They often do receive considerable sums of Money belonging to other persons; for when a Policy is effected, and a Loss incurred, they are constantly in the habit of settling the Loss with the Underwriter, and of receiving from him the amount of such Loss, which they pay over to the Merchant who employs them. They are therefore within the reason, and the words, of the Act.

With respect to the supposed concert, for the purpose of taking out the Commission, no Case is made by the Petitioner; all she swears is, as to *information and belief*; that is not sufficient; facts ought to have been stated and sworn to. Where an Affidavit is only as to information and belief, no Counter-Affidavit is necessary. The same observation applies as to the Affidavit stating Stock-jobbing Transactions by *Aubert*; it is only as to information and belief, and *Aubert* was not obliged to answer it.

CASES IN CHANCERY.

259

The VICE-CHANCELLOR :—

In these Cases, it is not sufficient to state, in the Affidavit, that the Party is informed and believes; but the Person who gave the information must make an Affidavit, or at least it must be stated by whom the Deponent was informed, and that such Informant refuses to make an Affidavit.

1819.

Ex parte
STEVENS,
in re
AUBERT.

In one of the Affidavits the Deponent states, that on inquiry at the House of the Bankrupt, *Aubert's* Servant stated that no Sale of *Aubert's* Effects had taken place, and that no Person had been put into the House; that is a strong fact to induce a suspicion of Concert. That Affidavit ought to have been answered. Let this Petition stand over for that purpose; and let Inquiries be made as to the nature of the business of an Insurance Broker. If it is insisted upon, the question, whether an Insurance Broker can be made a Bankrupt, must be sent to Law.

The Petition accordingly stood over, and Affidavits were afterwards filed on both sides.

The Affidavits of several Insurance Brokers were filed on behalf of the Respondents. These Affidavits stated, that the business of an Insurance Broker, consists in being employed by Merchants and others to effect Insurances on Goods, Ships, and Freights, and procuring Policies of Insurances to be effected thereon, by Underwriters and public Insurance Companies in the City of London; that an Insurance Broker is entitled to receive a Commission of 5 per cent. on the amount of the Insurance, upon the Sums insured by such Policies; that the Insurance Broker, upon effecting

1819.

Ex parte
STEVENS,
in re
AUBERT.

such Policies, becomes indebted to the Underwriter or public Insurance Companies, to the amount of such Premiums; that when Losses happen or arise upon such Policies, the Insurance Broker is generally employed to adjust such Losses with the Underwriters, or public Insurance Companies, and upon such adjustment, receives the amount of such adjusted Losses for his Principals, whereby the Insurance Broker very frequently becomes a Debtor to his Principals in large sums of Money; that Insurance Brokers are in all cases entitled to one half, or 10s. for every 100 l. in the amount of such adjusted Losses.

Affidavits were also made as to the other parts of the Case.

Upon the whole, after another Argument, the *Vice-Chancellor* said he could not decide against the Commission upon the ground that an Underwriter could not be made a Bankrupt; but that the Petitioner, if he pleased, might try that point at Law.—[The Petitioner declined trying the question at Law.]

With respect to the concerting of the Commission, he was of opinion, that though there were suspicious circumstances, yet that there was not sufficient proof of the Fact; the delay in selling the House, Fixtures and Furniture, might be, as stated in the Affidavit of the Assignees, with a view to benefit the Estate, by obtaining a Purchaser for the whole.

Mr. *Montagu* asked for Costs.

Mr. *Bell*, and Mr. *Maddock*, *contra*, insisted, this was not a Case in which Costs should be given to the

Respondents. They admitted that, in general, it was a rule, that if a Petition against a Certificate failed, the Petitioner pays the Costs; but that it had been decided in *ex parte Gardner* (a), that where a Petition is to supersede a Commission, on the ground of collusion, and to stay a Certificate, and there are suspicious circumstances in the conduct of the Bankrupt, as there were in this Case, Costs will not be given, though the Petition fails.

1819.

Ex parte
STEVENS,
in re
AUBERT.

The VICE-CHANCELLOR :—
This is not a Case for Costs.

(a) 1 Ves. & Bea. 49.

MELLING v. MELLING.

1819.

7th May.

THIS was a Motion, on behalf of the Infant Plaintiff, to substitute another next Friend in the place of the Person who had hitherto conducted the Suit in that character, and who desired to withdraw himself.

The next Friend of an Infant Plaintiff cannot withdraw himself from that Situation, without a Reference to the Master.

The VICE-CHANCELLOR :—

Let the *Master* inquire, whether it is for the benefit of the Infant that another next Friend should be substituted, with liberty to state any special circumstances. It may be that the Suit is improper, or has been improperly conducted, and the next Friend is not thus to escape from Costs to which he may be liable.

1819.

COATES and another v. PEARSON.

7th May.

Cause will not be adjourned when near a hearing, because a Cross Bill has been filed, which has not been answered.

MR. GARRETT moved, that a Cause, which was twenty-seven off, might be adjourned until the first day of Causes in Trinity Term; a Cross Bill having been filed, and no Answer put in.

The VICE-CHANCELLOR:—

If the Cross Bill had been filed in due time, you might have moved to have staid Publication in the original Cause until an Answer was put in, but you cannot now stop the progress of the Cause.

Motion refused.

10th May.

Ex parte WARWICK, in re COOPER.

If a Commission be obtained by Collusion with the Bankrupt, but Assignees are chosen, who are not under the Control of the Bankrupt, and the Commission is fairly proceeding for the benefit of the Creditors, it will not be superseded.

THE Bankrupt, by Collusion and Management, procured the Commission to be taken out; but the Assignees were fairly chosen. The Bankrupt and two Creditors sought to supersede the Commission.

The VICE-CHANCELLOR:—

Though a Commission is taken out by the management of the Bankrupt, yet, if Assignees are chosen under the Commission, who are not under the control of the Bankrupt, and the Commission is fairly proceeding for the benefit of the Creditors, the Court will not supersede it. I have consulted the *Lord-Chancellor*

upon this distinction, and he is pleased to approve it. The delay and expense of a new Commission must be injurious to the Creditors. I consider this, however, to be, in truth, the Petition of the Bankrupt, who could never be permitted to supersede a Commission obtained by means of his own Collusion.

1819.

Ex parte
WARWICK,
in re
COOPER.

Petition dismissed.

Mr. *Heald*, and Mr. *Rose*, in support of the
Petition:

Mr. *Cullen*, and Mr. *J. Martin*, *contra*.

His Majesty's ATTORNEY-GENERAL, at the Rela-
tion of JOHN HARVEY STEPHENSON,

Informant,

v.

MARTHA HARLEY HARLEY, and the Rev. WIL-
LIAM BAGSHAW, Clerk - - Defendants.

22d April,
12th May.

THIS Cause now came on, upon *Exceptions* to the
Master's Report.

Upon Exceptions, an unconditional Legacy given by a third Testamentary Paper, was held to be a substitution of a conditional Legacy to the same Amount, given by the first Testamentary Paper.

An Information and Bill was filed on the part of His Majesty's *Attorney-General*, for the purpose of having an Account taken of the personal Estate and Effects of *Ann Newton*, the Testatrix in the Pleadings mentioned, and of the Debts, Legacies and Annuities given

1819.

ATTORNEY
GENERAL
v.HARLEY
and another.

by her Will; and that the charitable Bequests contained in her Will might be established, and the Residue applied to charitable Purposes as thereby directed. On the hearing of the Cause, the usual Inquiry was (amongst other things,) directed to be made as to the Legacies given by the Testatrix's Will; viz. that the *Master* should take an Account of the said Testatrix's Debts, Funeral Expenses and Legacies, and the Arrears of the Annuities given by her Will, &c. The Testatrix's Will was composed of three several Testamentary Papers, by the latter of which she gave Legacies to the same Persons, and in most instances to the same amount, and under similar qualifications, as were objects of her bounty in the first Paper; and in consequence of the difficulty there was in coming to any conclusion as to the proper construction to be put upon such Legacies, it was deemed necessary to obtain an Order, that the *Master* might be at liberty to make a separate Report on the Legacies and Annuities given by the Will of the Testatrix, so that the Opinion of the Court might be obtained immediately without waiting for the *Master's* general Report, which, by an Order dated the 24th day of April 1818, was ordered accordingly.

The *Master*, by his Report, stated, that certain persons, whom he named, were, under these three Testamentary Papers, entitled to double Legacies under the first and third Testamentary Papers; and in consequence eight Exceptions were taken by the Plaintiffs to his Report. Only the first Exception is necessary to be noticed, the others being decided on the same principle.

The first Exception was, "For that the said *Master* hath in and by his said Report certified, that there are payable to *Martha Harley*, according to the true construction of the Will of the Testatrix *Ann Newton*, in the Pleadings of this Cause named, the Legacy of 1,000*l.* as therein mentioned; and also to the said *Martha Harley* (Tax deducted) another Sum of 1,000*l.* whereas the said *Master* ought to have certified, that according to the true construction of the said Will, the latter of such Legacies only was payable to the said *Martha Harley*."

1819.
ATTORNEY
GENERAL
v.
HARLEY
and another.

In order to understand the force of this Exception, it will be necessary to state the Substance of the first and third Testamentary Papers.

First Testamentary Paper:—"To *Martha Harley*, [whom the Testatrix appointed her Executrix,] for attending during her Life, and seeing all these directions executed during her Life; and by her last Will and Testament ordering the same to be done by her Executors, 1,000*l.*"

Third Testamentary Paper:—"To *Martha Harley*, Tax deducted out of my Property, 1,000*l.*;" and by this Paper the Testatrix appointed *Martha Harley* Executrix.

Mr. Hart, Mr. Heald, Mr. Shadwell, and Mr. Simpson, in support of the Exception:—

Primâ facie, the Gift in the third Testamentary Paper is of the same Sum, for the same purpose. This last Testamentary Paper appears to have been intended by the Testatrix as her only Will; but the Ecclesiastical

1819.

ATTORNEY
GENERAL
v.
HARLEY
and another.

Court has decided that these three Papers form one Will. Forming one Will, the Case falls within the decision in *Garth v. Meyrick* (a), where it was held, that two equal Legacies in the same Will, to the same Legatee, only passes one. In *Ridges v. Morrison* (b), the Rule is thus laid down: "Where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the Gift, the Court has inferred the Testator's intention to be the same, and rejected the Accumulation; but when the same quantity is given, with any additional cause assigned for it, or any implication to show that the Testator meant that the same thing, *primâ facie*, should accumulate, the Court has decided in favor of the Accumulation." Here the 1,000 *l.* is given by the first Paper, and she is appointed Executrix; the same Sum is given in the third Paper, and she is again appointed Executrix; both Bequests, therefore, are of the same Sum, for the same Cause; and the latter Bequest being without any additional reason assigned for the repetition, it must be held not to be accumulative. In *Hooley v. Hatton* (c), it was decided, that "where the like quantity is given twice, one only shall be taken, unless an intention appears to the contrary;" no intention appears here to the contrary. In *Coote v. Boyd* (d), it was determined, that where a second Codicil appears to be a repetition of a former Codicil, (with the addition only of a simple Legacy to another Person,) the Legacies were not accumulative. In *Benyon v. Benyon* (e), the Master of

(a) 1 Bro. C. C. 30.

(c) Reported 1 Bro. C. C. in Note.

(b) *Ridges v. Morrison*, 1 Bro. C. C. 393.

(d) 2 Bro. C. C. 521.

(e) 17 Ves. p. 43.

the Rolls says, "a Legacy of the same Sum for the same Cause, given by a Codicil, is repetition and not addition." There are no circumstances whatever in the last Testamentary Bequest from which it can be inferred that a double Legacy was intended.

1819.
ATTORNEY
GENERAL
v.
HARLEY,
and another

Mr. Bell, Mr. Bernal, and Mr. Farrer, contra :—

These must be considered as double Legacies. The Decision of the Ecclesiastical Court is decisive, that these three Testamentary Papers constitute one Will. It cannot, therefore, be successfully argued, that the last Paper was only intended to be the Will of the Testatrix ; and that it revoked the former Testamentary Papers. On that subject the Court is concluded. If the Ecclesiastical Court decided wrongly, they should have appealed from its Decision.

The Legacy in the first Paper is a conditional Legacy ; it is "for attending during her Life, and seeing all these Directions executed during her Life, and by her last Will and Testament ordering the same to be done by her Executors, 1,000*l*." But the Legacy given by the third Paper is merely a general Legacy, without any conditional expressions ; it is given in a different shape from that given before ; the Tax upon it is directed to be paid out of her other Property ; it is an accumulative Legacy.

The VICE-CHANCELLOR :—

If the Legacies to *Mrs. Harley* were alone to be considered, she would be plainly entitled to both ; but the Question here is, whether the third Instrument does not afford internal Evidence that it was meant by the Testatrix, not as an addition to the first Instrument,

1819.

ATTORNEY
GENERAL
v.
HARLEY
and another.

but as a substitution for it. It begins with all the forms of the first Instrument, with the same expressions of religious resignation, nearly in the same words. It then proceeds to appoint *Martha Harley* her sole Executrix, by the same description as in the first Instrument; and it then proceeds to give, with little variation, the same Legacies to the same Persons who were the objects of her bounty by the first Instrument. I think the inference irresistible, that the Testatrix intended the third Instrument as a substitution for the first; and that *Mrs. Harley* must therefore take the unconditional Legacy of 1,000 *l.* given by the third Instrument, in the place of the conditional Legacy given by the first Instrument.

Exception allowed.

MYERS v. ———.

27th May.

THE *Vice-Chancellor* determined, that after a Motion to dismiss the Bill, and an undertaking by the Defendant to speed the Cause, the Plaintiff could not, as a Motion of Course, move for Leave to amend the Bill; but that a special Application for that purpose was necessary.

Ex parte BRIDGES, *in re* MOORHOUSE.

1819.

8th June.

THIS was a Petition to expunge a Proof of a Debt of 13,336*l.* 19*s.* 3*d.* under a Commission, on the ground that it was admitted upon insufficient Evidence; viz. an Affidavit of the Creditor, who died before the Proof was made. Two Dividends had been paid on the Proof.

On Petition to expunge a Proof founded on an Affidavit of a Creditor, who died before the Proof was made, the Commissioners were directed to review the Proof, although two Dividends had been paid.

Mr. *Horne*, and Mr. *Teed*, in support of the Petition.

Mr. *G. Wilson*, *contra*, cited *The King v. Joliffe (a)*, *Mayor of Doncaster v. Day (b)*, and observed, that the Affidavit was sworn at a time when it might have been received, and under the penalty of Perjury; and that it was not like an Affidavit made for the purpose of being used after the death of the Person making it; and that if the Proof was defective, it was only in point of Form.

The VICE-CHANCELLOR:—

A Debt must be proved under a Commission, either by Deposition or Affidavit, and the Commissioners Signature to the Proof. In point of Form, this Proof was irregular, and the payment of two Dividends does not preclude a Petition to expunge the Proof.

Declare that the Adjudication of Debt is irregular, being founded upon the Affidavit of Mrs. *Buckle* alone, who was dead at the time the said Affidavit of Debt was exhibited to the Commissioners; and let it be referred

(a) 4 Term Rep. 284.

(b) 3 Taunt. 262.

1819.

Ex parte
BRIDGES
in re.
MOORHOUSE.

to the Commissioners to review the Proof, and reserve the further Directions and Costs, until the Commissioners shall have reviewed the Proof, and made their Report.

Ex parte BASS.

8th June.

Bankrupt may petition to supersede his Commission, on the ground that he was no Trader, though he has obtained his Certificate under it, if upon an Action by the Assignees against a Creditor their Title is successfully resisted, and the Commission becomes inoperative.

THE Bankrupt petitioned to supersede his Commission, under which he had obtained his Certificate, on the ground that he had not been a Trader.

Mr. Owen, and Mr. Barber, for the Petition :—

There is no doubt that such a Petition may be presented, notwithstanding the Bankrupt has obtained his Certificate(a). The Bankrupt alone can be injured by the *Supersedas*, but he is content to risk that. An Action was brought by the Assignees, but they withdrew the Record, as they were unable to prove a Trading.

On the other side, it was said, that an Action by the Assignees of the Bankrupt was now pending, in which the Question would be tried.

THE VICE-CHANCELLOR :—

A Bankrupt is not permitted, after he has obtained his Certificate, to impeach his own Commission, upon the ground that he was no Trader; but if, upon an Action at Law, the Title of the Assignees is successfully resisted, and the Commission therefore becomes inoperative, a Bankrupt may petition to supersede it. Let the Petition stand over, until after the trial of the Action.

(a) See *Ex parte Moule*, 14 Ves. 602; *Ex parte Cullen*, Buck, 69.

INMAN and others v. PARSONS.

1819.

29th June.

A. MORTGAGES to **B.**; **C.** is the only Witness to such Mortgage. **B.** dies, and bequeaths to the Wife of **C.**, and also to others, the Mortgage. **C.** and Wife, and the others, file a Bill of Foreclosure against **A.** and subsequent Incumbrancers. Proof of **C.**'s Hand-writing by a third Person, was held, by the *Vice-Chancellor*, sufficient proof of the execution of the Mortgage made by **A.** to **B.**

Mr. *Wingfield*, and Mr. *Beames*, for the Plaintiffs.

_____ for the Defendants.

ANONYMOUS.

MR. ROSE applied, that a Cause, not in the Paper, might now be called, for the purpose of proving a Will, the proper Officer having come up from *York* with the Original for that purpose, and was detained in Town at a considerable Expense, it having been expected that the Cause would have been in the Paper. There was no Affidavit, but the Application was granted, and the Cause called on, and the Will proved by the production of the Original to the Registrar in Court.

29th June.

1819.

22d July.

Where the Plaintiff's Bill is ancillary to his legal Title, and he fails at Law, he must pay Costs in Equity.

MEYRICK v. WHISHAW.

THE Bill was filed to remove outstanding Terms which the Plaintiff alleged prevented the Trial of his legal Title; and upon the hearing of the Cause, a Case was stated for the opinion of the Court of King's Bench, which was given in favour of the Defendant.

The Cause now came on upon further Directions, and the only Question was, as to Costs.

Mr. *Wetherell*, and Mr. *Wilbraham*, for the Plaintiff, contended, that as the Defendant's Title was doubtful, as appeared by directing a Case, and as there was a decision in his favour, the Defendant's Title was now rendered marketable; and that having such advantage, the Plaintiff ought not to pay all the Costs of the Suit; but though his Bill must be dismissed, it ought to be without Costs.

Mr. *Sugden*, *contra*, for the Defendant, insisted, that Costs were of course, on the dismissal of the Bill.

The VICE-CHANCELLOR:—

The Plaintiff, by his Bill, asserted a legal Title, but prayed that outstanding Terms might be put out of his way. If there had been no outstanding Terms, and he had at once proceeded at Law, he must have paid the Costs of all Proceedings, and he must, therefore, pay the Costs of this Suit, which was merely ancillary to his legal Title.

Bill dismissed, with Costs.

ANONYMOUS.

1819.

ON further Directions, the Case appeared to be, that application had been made to an Executor for an Account, but that he gave no Account. The Bill was then filed; and by his Answer, the Defendant stated the Accounts; but the Plaintiff took a Decree for an Account. It turned out, on the *Master's* Report, that the Account given by the Answer was correct; and the question now was, as to Costs. The *Vice-Chancellor* gave the Plaintiff the Costs of the Suit up to the Decree; and the Defendant, the Costs of the subsequent Proceedings.

22d July.

Mr. *Roupell* for Plaintiff.

Mr. *Bickersteth* for the Defendant.

Ex parte LAW.

ON an *ex parte* application by Mr. *Wetherell*, and Mr. *Rose*, to supersede a Commission, with the Consent of the petitioning Creditor, before the time appointed for the first Meeting for the proof of Debts, the question was, whether this application was prevented by the recent *General Order* of the 21st August 1818(a).

Same date.

Commission cannot be superseded, with the Consent of the petitioning Creditor, before the first Meeting for the proof of Debts.

(a) See this Order, *ante* vol. 3, p. 392.

1819.

Ex parte
LAW.

The *Vice-Chancellor* desired that the application might be made to the *Lord Chancellor*, it being his Order, who held, that, though not within the words, it was within the spirit, of the Order, and refused the application.

ATTORNEY GENERAL v. FEA.

23d July.

In a Suit by the Attorney General, respecting a Breach of Trust as to Property belonging to a Charity, the Court will permit a Reference, if the Attorney General consents; but not if the question is upon the construction of a Will.

ON the coming on of this Cause, which was for relief upon an imputed Breach of Trust, as to Property belonging to a Charity, the Defendants proposed a Reference.

The VICE-CHANCELLOR:—

There was a Charity Case before me, where a Reference was asked to a Gentleman at the Bar, to decide upon the construction of a Will. I thought that was not a proper Case to refer; but in this Case, I think a Reference is proper, if the *Attorney General* consents. Let the Cause stand over to ascertain whether the *Attorney General* will consent to a Reference.

Mr. Hart, for the *Attorney General*, and the Relator.

Mr. Heald, and Mr. Dowdeswell, for the Defendants.

HALEY and others v. BANNISTER and others.

1819.

23d, 26th July.

BY an Order in this Cause, 4th July 1818, it was referred to the *Master* to inquire and state, whether the Defendant, *Aylmer Haley*, was of ability to maintain and educate the Plaintiffs, his infant Children; and in case he was not, to state what would be proper to be allowed for that purpose, and for what time, and out of what Fund.

10th Feb. 1820.

The Statute prevents an accumulation, directed by Will, of Interest during the Minority of an unborn Child: the Excess forms part of the Residue. Wherever Children born, and to be born, have a common Interest in a Fund; the Fund, if necessary, may be applied for the maintenance of the Children.

The *Master*, by his Report, 30th May 1819, found, that all the Property of *Aylmer Haley* consisted only of an Annuity of 180*l.* during his life, of which he was not then in the receipt; but that his Wife, *Amelia Haley*, was in possession of a separate Estate to the amount of 1,300*l.* a year, subject to the Annuity of 180*l.*; and that he was of opinion the said *Aylmer Haley*, personally and independently of the said *Amelia* his Wife, was not in circumstances and of ability to maintain the Plaintiffs, his infant Children; and therefore that he had proceeded to consider the other parts of the reference, and found that the Testator, *R. Bannister*, by his Will, 11th July 1812, devised certain Estates, after the decease of *Aylmer Haley* and his Wife, to the use of all the Children of his Daughter *Amelia Haley*, then born or thereafter to be born, as Tenants in common, and to their respective Heirs for ever; and that the Testator, by the first Codicil to his Will, directed that 6,000*l.* Three per cent. Consols, and 6,000*l.* Three per cent. Reduced Annuities, should be purchased in the names of his Executors, and that they should receive and invest the

If the Father is not of ability, the Court will allow Maintenance for the Children, although the Mother has a competent separate Estate.

1819.

HALEY
and others,

v.

BANNISTER
and others.

Dividends so as to accumulate until one of the said Children should attain the age of twenty-one, and upon his or her attaining that age (if there should be only one Child who should attain that age) transfer the whole of the said two several Sums to such only Child; and if more than one such Child then living, to transfer to such Children one equal part of the said Annuity and Accumulations, in proportion to the number of such Children then living: and he found, that in pursuance of an Order, the two Sums of 6,000*l.* and 6,000*l.* had been carried over to the Infants separate Account, and that there was standing on their separate Account 6,810*l.* 11*s.* 4*d.* Three per cent. Consols, and 6,688*l.* 19*s.* 11*d.* Three per cent. Reduced Annuities, and in Cash 100*l.* 6*s.* 8*d.* which had arisen from the said Annuities; and that the Plaintiffs, the Children (five in number), were all Infants, the eldest being only ten years old, and that the present Expense of educating and maintaining them would amount to 230*l.* a year; but that to enable the Father to live in a style suitable to the expectations of his Children, he was of opinion it would be proper to allow 300*l.* a year for their maintenance and education, from the Testator's death, 28th December 1815, to 5th April 1819, and from that time an allowance of 50*l.* a year for each of the five Children; and that, as it did not appear to him that the Infants were entitled to any Fortune in possession, except the said Annuities placed to their separate Account as aforesaid, he conceived it would be proper that the said sum of 100*l.* 6*s.* 8*d.* in Cash, and by the sale of so much of the said Annuities standing to their separate Account as should be necessary for that purpose; and that said several allowances of 50*l.* for the maintenance of each of the said infant Children, from said 5th April

1819, and for the time to come, should be paid out of the Dividends of said 6,810*l.* 11*s.* 4*d.* Three per cent. Consols, and 6,688*l.* 19*s.* 4*d.* Three per cent. Reduced Annuities, placed to their separate Account, or so much thereof as should remain after the sale thereof before mentioned.

1819.
HALEY
and others,
v.
BANNISTER
and others.

The residuary Clause in the second Codicil to the Testator's Will was as follows: "And instead of my said Daughter *Amelia Haley* being my residuary Legatee, I make my Executors residuary Legatees, in Trust for the benefit of my said Daughter *Amelia Haley's* Children, whatever the Residue may be; my Executors will add to it the other Consolidated and Reduced Bank Annuities which I have left to my Daughter *Amelia Haley's* Children."

The Cause now came on for further directions upon the *Master's* Report.

Mr. *Wetherell*, and Mr. *Lovat*, for the Plaintiffs:—

So far as respects the present Children, the Accumulation directed is good; but the Accumulation directed by the Will is contrary to the late Statute (*a*), so far as it gives the Accumulations to a Child, at present unborn, on attaining twenty-one, in case of the deaths of all the present Children before they attain that age. *Griffiths v. Vere* (*b*); *Longdon v. Simson* (*c*).

The VICE-CHANCELLOR:—

The Statute prevents an accumulation of Interest during the Minority of an unborn Child; but as to the

(*a*) 39 & 40 Geo. III, c. 98.

(*b*) 9 Ves. 127.

(*c*) 12 Ves. 295.

1819.

HALEY
and others,

v.

BANNISTER
and others.

Principal, the Law remains as before the Statute. The excess of Accumulation, prohibited by the Statute, would form part of the Residue.

Argument for Plaintiff, continued.

We contend that there is no Fund out of which Maintenance can be directed. Children may come *in esse*, who will be entitled. The shares of the present Children are contingent, and therefore there is no Fund applicable to their Maintenance. *Errington v. Chapman (d)*; *Erratt v. Barlow (e)*.

THE VICE-CHANCELLOR :—

Erratt v. Barlow comes very near this Case; but as it appears by the Report that the Case stood over, that the Lord Chancellor might look into the Will, I wish that the Registrar's Book should be searched, to see what was finally ordered in that Case. Possibly, Mr. Vesey has a Note of the final decision. May it not be a question, whether the Court will give Maintenance to the Father where the Mother has a competent separate Estate?

26th July.

The Cause came on again this Day.

Mr. Hart, Mr. Simkinson, and Mr. Perkins, for the Defendants :—

Mr. Vesey, on an application to him, cannot find any Note of what was finally done in *Erratt v. Barlow*, and no Order appears by the Registrar's Book to have been made by the Lord Chancellor; but it appears that, on

(d) 12 Ves. 20.

(e) 14 Ves. 202.

an application afterwards to the *Master of the Rolls* in the same Case, it was "Ordered, that the *Master's* Report should be confirmed; and that the sum of 50*l.* per annum, certified by the said Report as proper to be allowed for the Maintenance and Education of each of the Infants, during their respective Minorities, from the 28th April 1807, be allowed accordingly, with a direction for Payment to the Father."—Reg. Lib. Hil. 1808. Lib. A. fol. 645.

1819.
HALEY
and others,
v.
BANNISTER
and others.

There is no Case in which the Mother of the Children, having a separate Estate, has been held liable to maintain her Children, where her Husband is not of ability. In *Cavendish v. Mercer* (*f*), the Wife had a separate Estate of 400*l.* a year, but still Maintenance was given in that Case, the Father not being of ability. In *Billingsby v. Critchett* (*g*), it was held that a Mother, married to a second Husband, was not bound to maintain the Children by her first Husband, but was entitled to an Allowance for that purpose out of their Fortunes. In that Case, the Mother had a Provision from her first Husband, and a further Estate from her own Family. In *Hughes v. Hughes* (*h*), it is, indeed, said, that the practice of the Court, on these occasions, is, to refer it to the *Master*, to inquire whether the *Parents*, in the plural number, are of ability to maintain the Children; but that is the only Case to that effect.

The VICE-CHANCELLOR:—

I believe the point is new. In *Cavendish v. Mercer*, it was not discussed, and if it had been, the Wife's se-

(*f*) Mentioned in Note to *Greenwell v. Greenwell*, 5 Ves. 197.

(*g*) 1 Bro. C. C. 268.

(*h*) Ibid.

1819.

HALEY
and others,
v.
BANNISTER
and others.

parate Estate of 400*l.* a year was so small a sum, that it could hardly, under the circumstances of that Family, have been an object worth considering. The Order made by the *Master of the Rolls*, in *Erratt v. Barlow*, appears to have been an *ex parte* Order.

The Case was afterwards mentioned again on the 10th February 1820, and on the 21st February the *Vice-Chancellor* gave his Judgment.

THE VICE-CHANCELLOR:—

The Wife, during the life of the Husband, not being under a legal obligation to maintain the Children, I think this Court cannot take into consideration her separate Estate.

The next question is, whether, attending to the Terms of this Will, I can order Maintenance to be paid to the Father out of the Property bequeathed to the Children? I am of opinion I can; for I take the principle to be, that wherever the Children have a common Interest on a Fund, the income of the Fund, if necessary, may be applied to their Maintenance. In this Case, Children born or to be born have a common Interest, and therefore the income of the Fund is in this Case applicable to Maintenance.

1819.

Ex parte Lord GWYDIR and another (a).

30th March.

THIS was the Petition of the Right honourable *Peter Lord Gwydir*, and also of *Robert Paddison*, of *Louth*, in the County of *Lincoln*, Gentleman, the Steward of *William Scrope*, Esquire, for and on behalf of the said Lord *Gwydir* and *William Scrope*, and for and on behalf of divers other Persons having or claiming Common in and upon the respective Manors and Lands of them the said Lord *Gwydir* and *William Scrope* in the Petition mentioned.

The right of the Subject to traverse an Inquisition, extends to every Case in which Property is found in the Crown; and is not confined to Cases where the Crown claims Property by reason of the incidents of Tenure.

The Petition stated, that on the 31st day of October, in the 59th year of the reign of his Majesty King *George the Third*, a Commission under the Great Seal of the United Kingdom of *Great Britain and Ireland*, was issued in the following words; (that is to say) "*George the Third*, by the Grace of God, of the United Kingdom of *Great Britain and Ireland*, King, Defender of the Faith: To *Charles Wray*, Esquire, *Robert Sandwith*, *Richard Garland*, *George Codd*, *William Green*, and *George Abraham Crawley*, Gentlemen, greeting: Whereas we have been informed and given to understand, that several Lands in or adjoining or near to the several Towns, Parishes or Lordships of *North Somercotes*, *South Somercotes*, *Ganthorpe* otherwise *Grainthorpe* *Wragholme*, *North Cotes*, *Marsh Chapel* and *Tetney*, some or one of them, in our County of *Lincoln*, being Lands in time past covered with the Water of the Sea,

But when the Application for permission to traverse is made to this Court, it will not be authorized, unless the Petitioner makes out a prima facie Title against the Crown.

(a) This Case is not placed according to its date, owing to delay in receiving the necessary papers.

1819.

Ex parte
Lord GWYDIR
and another.

and now by the Sea left and not covered with Water, and which therefore to us, by virtue of our Prerogative Royal, ought to have come and do belong, are concealed, subtracted and unjustly withheld and detained from us, to the Injury, Damage and Prejudice of our Crown of our said United Kingdom; we, therefore, being willing to be more fully certified of the premises, and very much confiding in your fidelity and prudent circumspection, have assigned you to be our Commissioners in this behalf: and by virtue of these presents do give to you, or any three or more of you, full power and authority, as well by the Oaths of good and lawful Men of our said County of *Lincoln*, as well within Liberties as without, as by the Examination and Depositions of Witnesses worthy of credit upon their corporal Oaths, to be taken upon the Holy Evangelists, before you, or any three or more of you, which Oaths we do hereby authorize and empower you or any three or more of you to administer, as by all other ways, means and methods whereby you or any three or more of you may or can better know or be informed, whether there are any and what Lands, and how many acres of Land in or adjoining or near to the several Towns, Parishes or Lordships aforesaid, or any or either of them, in our County of *Lincoln* aforesaid, being Lands in time past covered with the Water of the Sea, and now by the Sea left and not covered with Water, which to us, in right of our Crown of our said United Kingdom, or in any other right, do belong and appertain, and which are concealed, subtracted and unjustly withheld and detained from us; and when, how and in what manner soever, and if so, by whom, and how long, and who hath received and taken the Issues and Profits thereof from the time of such dereliction or not covering, and

1819.

Ex parte
Lord GWYDIR
and another.

to what Amount and in whose Possession or Tenure the said Lands now are or remain, and how much they are worth by the year, according to the true Value thereof; and also of all other articles, matters and circumstances which you or any three or more of you shall judge fit and necessary to be inquired into, touching the premises, and all and singular the Lands which by the Inquisition to be taken in this behalf shall be found to be concealed, subtracted and unjustly withheld and detained from us, to enter upon, and take and seise into our hand. And therefore we command you, that at such day and place, or days and places, as you or any three or more of you shall appoint for that purpose, you or any three or more of you diligently set about the premises, and do and execute all and singular the matters aforesaid, with effect, so that as well the Inquisition as all other matters by you or any three or more of you taken and done in the premises, you or any three or more of you send and certify to us, into our Chancery, under your Seals, or the Seals of any three or more of you, and the Seals of those Persons by whom such Inquisition shall be made, distinctly and openly, without delay, together with these our Letters Patent. And we also command, by the tenor of these presents, our Sheriff of our County of *Lincoln* aforesaid, that at such day and place, or days and places, as you or any three or more of you shall appoint for that purpose, and on our part make known to him, he cause to come before you or any three or more of you such and so many good and lawful Men of his Bailiwick, as well within Liberties as without, by whom the truth of the matter in the premises may be better known and inquired into. We also give to you or any three or more of you full power and authority to call and procure to appear be-

1819.

Ex parte
Lord GWYDIR
and another.

fore you or any three or more of you all Persons whomsoever fit to be examined in the premises; and their Examinations, they being first duly sworn before you or any three or more of you, to receive and take. And we also, by the tenor of these presents, strictly command all and singular Justices, Mayors, Sheriffs, Bailiffs and all other our faithful Subjects of our said County of *Lincoln*, that to you or any three or more of you in the execution of these presents, they be attendant, obedient, aiding and assisting in such manner as you or any three or more of you shall make known to them on our behalf. In testimony whereof we have caused these our Letters to be made patent. Witness ourself at *Westminster*, the 31st day of October, in the 59th year of our Reign.—By Warrant from the *Attorney-General*.

“ *Plumer*.

“ *Dunn*.”

That afterwards (to wit) on the 12th day of December, in the 50th year of the reign of his said Majesty, the said *Charles Wray*, *Robert Sandwith* and *Richard Garland*, three of the said Commissioners in the said Commission named, certified under their Hands and Seals the execution of the said Commission, in the following words written thereon; (that is to say), “ The execution of this Commission appears by the Schedule hereto annexed: *Charles Wray*, *Robert Sandwith*, *Richard Garland*.” Which said Schedule, so by them the said Commissioners certified as aforesaid, was of the tenor, or in substance contained the several matters hereinafter next following; (that is to say), “ *Lincolnshire* to wit. An Inquisition indented, taken at *Cleathorpes*, in the County of *Lincoln*, at the House of *William Benson*, known by the name of the *Cleathorpe’s Hotel*, on Thursday the 12th

1819.

Ex parte
Lord GWYDIR
and another.

day of November, in the 59th year of the reign of our Sovereign Lord *George* the Third, by the Grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, before us, *Charles Wray*, *Robert Sandwith* and *Richard Garland*, Gentlemen, Commissioners of our said Lord the now King, by virtue of a Commission of the same Lord the King, under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster* the 31st day of October last, to us and others in the same Commission named, directed, and to this Inquisition annexed, to inquire, on the behalf of the said Lord the King, of and upon divers things, articles and circumstances in the same Commission specified, upon the Oath of *Thomas Frear*, *Philip Skipworth*, *Robert Cropper*, *Stamper Anningson*, *John Bonnun*, *William Parker*, *William Nicholson*, *Benjamin Chapman*, *Thomas Hockney*, *John Mumey*, *William Brookes* and *William Bancroft* the elder, honest and lawful Men of the County aforesaid, who, being impannelled, sworn and charged to inquire touching the matters in the said Commission mentioned upon their Oaths, say that there is a certain Piece of Land, being Salt Marsh, lying near or adjoining to the Lordship of *North Somercotes*, in the said County of *Lincoln*, which Piece of Land is bounded towards the West by the Sea Wall or Sea Bank of *North Somercotes* and part of certain Sand Hills at or near *South Somercotes*, upon the East by the Sea, and on the North by certain Sand Hills called *Donna Nook*, and on the South by other part of the said Sand Hills, at or near *South Somercotes*, and extends from the said Sand Hills, at or near *South Somercotes*, on the South, to the said Sand Hills called *Donna Nook*, on the North part thereof, and contains by estimation 380 Acres or

1819.

Ex parte -
Lord GWYDIR
and another.

thereabouts, and is worth 3*s.* for each Acre, by the year, of lawful Money of the said United Kingdom, according to the true Value thereof; which same piece of Land was in times past covered with the Water of the Sea, and is now and has been for several years past by the Sea left and not covered with Water, except at high Tides, when the Sea doth flow to the said Sea Wall or Sea Bank; and which Land, from the time of such Dereliction, hitherto hath been and still is unoccupied, but the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep belonging to the Tenants or Occupiers of Land situate within the said Sea Bank or Sea Wall in the said Town, Parish or Lordship of *North Somercotes*. And the Jurors aforesaid, upon their Oath aforesaid, further say, that there is a certain other piece of Land, being also Salt Marsh, lying near or adjoining to the Parishes or Lordships of *North Somercotes*, *Ganthorpe* otherwise *Grainthorpe* *Wragholme*, and *Marsh Chapel*, in the County of *Lincoln*, which last-mentioned Piece of Land is situate between a certain Marsh called *Porter's Marsh* and the Lordship of *Marsh Chapel* aforesaid, and is bounded towards the South and South-east by the Sea Wall or Sea Bank of the said Marsh called *Porter's Marsh*, towards the South and South-west of the Sea Wall or Sea Bank of the said Lordships of *Ganthorpe* otherwise *Grainthorpe* and *Wragholme*, towards the West and North-west by the Sea Wall or Sea Bank of the said Lordship of *Marsh Chapel*, and towards the East and North-east by the Sea, and contains by estimation 795 Acres or thereabouts, and is worth 3*s.* for each Acre, by the year, of lawful Money of the said United Kingdom, according to the true Value thereof; and was in times past covered with

the Water of the Sea, and is now and has been for several years past by the Sea left, and is not covered with Water except at high Tides, when the Sea doth flow to the said Sea Walls or Sea Banks; which same piece of Land, from the time of such Dereliction, hitherto hath been and still is unoccupied, but the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep belonging to the Tenants or Occupiers of Lands within the said Sea Bank or Sea Wall in the said Towns, Parishes or Lordships of *North Somercotes*, *Ganthorpe* otherwise *Grainthorpe Wragholme*, and *Marsh Chapel*, some or one of them. And the Jurors aforesaid, upon their Oath aforesaid, further say, that there is also a certain other piece of Land, being also Salt Marsh, lying near or adjoining to the Parish or Lordship of *North Cotes*, in the said County of *Lincoln*, and which last-mentioned piece of Land is bounded towards the South and South-west by the Sea Wall or Sea Bank of the said Lordship of *North Cotes*, and towards the North-west by part of the Sea Wall or Sea Bank of certain Lands in the Lordship of *Tetney*, and on all other parts by the Sea, and contains 453 Acres or thereabouts, and is of the value of 4 s. for each Acre, by the year, of lawful Money of the said United Kingdom, according to the true Value thereof; and was also in times past covered with the Water of the Sea, but is now and has been for several years past by the Sea left, and is not covered with Water except at high Tides, when the Sea doth flow to the said Sea Walls or Sea Banks; which last-mentioned piece of Land, from the time of such Dereliction, hitherto hath been and still is unoccupied, but the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep

1819.

Ex parte
Lord GWYDIR
and another.

1819.

Ex parte
 Lord GWYDIR
 and another.

belonging to divers Tenants or Occupiers of Land situate within the said Parish or Lordship of *North Cotes*; all which said three several pieces of Land we the said Commissioners have therefore taken and caused to be seised into the hands of our said Lord the King, as by the Commission aforesaid we are commanded. In witness whereof, as well the said Commissioners as the Jurors aforesaid to this Inquisition, have interchangeably set their Hands and Seals, the Day and Year and Place first aforesaid.”—[Here followed the Names of the Commissioners and Jurors.]

That on the said 12th day of December, in the said 59th year of his said Majesty, the said Commission, together with the said Inquisition thereunto annexed, was returned to and filed in the Petty Bag Office:—That the Petitioner, Lord *Gwydir*, long before and at the time of the making and sealing of the said Commission, was, and from thenceforth hitherto hath been, and still is legally and equitably seised or possessed in his Demesne, as of Fee or of some other Estate of Freehold, of and in, or otherwise well entitled to the Manor of *Saltfleet-cum-Skidbroke*, in the said County of *Lincoln*, or the Site and Demesnes thereof; and that he this Petitioner, as the Lord and Owner of the said Manor or otherwise, and his Ancestors, Lords and Owners of the said Manor, and all those whose Estate he the said Lord *Gwydir* now hath, of and in the said Manor, or Site and Demesnes, during all the time aforesaid, and for a long time before (that is to say), either from time whereof the memory of man is not to the contrary, or for a certain other long time (to wit), for 300 years now last past, have, and every of them hath,

as such Lords and Lord, or otherwise, been lawfully seised or possessed of, or otherwise well entitled to so much of the Beach and Shore of the Sea, at ordinary Tides extending from low-water-mark to high-water-mark, as was subtended by, or parcel of or contiguous to the aforesaid Manor of *Saltfleet-cum-Skidbroke*; and also all such unembanked Salt Marshes as at any time during the period aforesaid have lain or do now lie between certain new embanked Marsh Lands, situate within the same Manor, and the said Sea Shore or Beach of the Sea, as parcel of the said Manor, or of the Site and Demesnes thereof, or as otherwise belonging, appertaining or annexed to the same Manor or Scite and Demesnes (that is to say), either by Prescription, from time whereof the memory of man runneth not to the contrary, or under or by virtue of some ancient Grant or Grants from the Crown, or by or under some other lawful and valid Title in the Law; and that the Owners and Proprietors of divers ancient Messuages, Cottages, Lands and Hereditaments, with their Appurtenances, situate within the aforesaid Manor of *Saltfleet-cum-Skidbroke*, during all the time aforesaid, or for a long time (to wit), for several hundred years now past, have had and of right ought to have had, and still of right ought to have, Common of Pasture for all manner of their Cattle, *levant* and *couchant*, upon the same several Messuages, Cottages and Lands, in, over and upon all the said uninclosed Salt Marsh Lands, within the said Manor of *Saltfleet-cum-Skidbroke*, at all times of the year, as to the same several Messuages, Cottages and Lands appendant, appurtenant, or in somewise belonging or annexed; and that a certain part of the said piece of Land in the said Inquisition

1819.

Ex parte
 Lord GWYDIR
 and another.

mentioned as being Salt Marsh, and therein described as lying near or adjoining to the Lordship of *North Somercotes*, in the said County of *Lincoln*, and as containing 300 Acres or thereabouts, is in fact and truth part and parcel of the said uninclosed Salt Marsh Lands within the said Manor of *Saltfleet-cum-Skidbroke*, whereof or whereto the said Petitioner, the said Lord *Gwydir*, is so seised or possessed, or otherwise well entitled as aforesaid:—That the said *William Scrope*, long before and at the time of the making and sealing of the said Commission, was and from thenceforth hitherto hath been and still is legally or equitably seised or possessed in his *Demesne*, as of Fee or of some other Estate of Freehold, of and in or otherwise well entitled to the Manor and Soke of *Gayton*, situate in the said County of *Lincoln*, parcel of the Honor of *Richmond* Fee; and that within the said Manor and Soke of *Gayton* there are situate divers large parcels of unembanked Salt Marsh Lands, amounting in the whole to divers (to wit) 800 Acres; and situate within the several Parishes, Townships or Lordships of *North Somercotes*, *South Somercotes*, *Ganthorpe* otherwise *Grainthorpe* and *Wragholme*, in the said County of *Lincoln*, and extending from a certain Sea Bank in the same several Townships, Parishes and Lordships, on the West to the high-water-mark of the Sea Shore, at the times of ordinary Tides, on the East side of the said last-mentioned Marsh Lands; and that the said *William Scrope* and his Ancestors, Lords of the said Manor and Soke of *Gayton*, parcel of the said Honor of *Richmond* Fee, and all those whose Estate he now hath, and at the several times aforesaid have had, of and in the same Manor and Soke, during all the time last aforesaid, and long before (to wit), either from

1819.

Ex parte
Lord GWYDIR
and another.

time whereof the memory of man is not to the contrary, or for and during some other long space of time (to wit), for the space of 300 years, have, or some or one of them have or hath been seised or possessed of or in, or otherwise been well entitled to, or have or hath held and enjoyed, and during all such time as aforesaid of right ought to have been seised or possessed of, and to have held and enjoyed, as well so much of the Sea Shore or Sea Bank, extending from low-water-mark, to high-water-mark at the time of ordinary Tides, as hath, during all the time aforesaid, lain or still doth lie contiguous or opposite to, or subtended by the said last-mentioned unenbanked Salt Marsh Lands, in the said Parish, Townships or Lordships of *North Somercotes*, *South Somercotes*, *Ganthorpe* otherwise *Grainthorpe* and *Wragholme*, as also the said last-mentioned unembanked Salt Marsh Lands, as parcel of or otherwise appertaining, belonging or annexed to the said Manor and Soke of *Gayton*, or some part or parcel thereof, either by Prescription, or by force and virtue of some Grant from the Crown, or by some other good, legal and valid Title in the Law; and also the Owners of divers ancient Messuages, Cottages and Lands in *North Somercotes* and *South Somercotes* aforesaid, and also divers Owners of certain Messuages, Lands, Tenements and Hereditaments in *Ganthorpe* otherwise *Grainthorpe* and *Wragholme* aforesaid, during such times or time as last aforesaid, have had, and of right ought to have had, and still of right ought to have, Common of Pasture for themselves, their Farmers and Tenants of the said Messuages, Cottages and Lands, for all manner of their Cattle, *levant and couchant*, upon the same Messuages, Cottages and Lands in *North Somer-*

1819.

Ex parte
 Lord GWYDIR
 and another.

cotes, South Somercotes, and Ganthorpe otherwise Grainthorpe and Wragholme aforesaid, with the Appurtenances, at all times of the year, in, upon and throughout certain parts of the said last-mentioned unembanked Salt Marsh Lands, as to the same Messuages, Cottages and Lands, with the Appurtenances respectively appendant, belonging or of right appertaining, or as parcel thereof, or otherwise thereto annexed, or some other Rights and Interests therein:—That a certain part of the said piece of Land, being Salt Marsh, in the said Inquisition described as lying near or adjoining to the Lordship of *North Somercotes*, in the said County of *Lincoln*, and containing 380 Acres or thereabouts, as aforesaid, is in fact and in truth part and parcel of the said unembanked Salt Marsh Lands in *North Somercotes* and *South Somercotes* aforesaid respectively, and that certain parts of the said other piece of Land, being also Salt Marsh, in the said Inquisition described as lying near or adjoining to the Parishes or Lordships of *North Somercotes, Ganthorpe otherwise Grainthorpe and Wragholme, and Marsh Chapel* aforesaid, and as containing 795 Acres or thereabouts, as aforesaid, are in fact and in truth parts and parcels of the said uninclosed Salt Marsh Lands in *North Somercotes, Ganthorpe otherwise Grainthorpe and Wragholme* aforesaid respectively: of all which matters your said several Petitioners are ready and hereby proffer themselves to show good Evidence to your Lordship, and to verify the same as your Lordship shall award:—That your Petitioner, the said Lord *Gwydir*, submits, and your Petitioner, *Robert Paddison*, for and on behalf of the said *William Scrope*, humbly submits to your Lordship, that the said several parcels of Salt Marsh

1819.

Ex parte
Lord GWYDIR
and another.

Lands in the said Inquisition and Return mentioned to be thereby seised into the hands of the Crown, are respectively the Property of your said Petitioner Lord *Gwydir*, and the said *William Scrope*, and not the Property of the Crown; and that no inquest of Office therefore ought to have been found under the said Commission, entitling the Crown to the same or any of them, nor ought the same or any of them to have been seised into the hands of our said Lord the King; and your said several Petitioners further submit, that it doth not appear, nor is it in any manner shown in and by the said Inquisition, that the Salt Marsh Lands therein described, and thereupon seised by the said Commissioners into the hands of the Crown as aforesaid, or any of them, did either before or at the date and time of the issuing forth of the said Commission, or before or at the date and time of the taking of the said Inquisition, or at any other time, belong or in anywise appertain to the Crown, and therefore that the Commissioners in the said Commission named were not, nor were or was any of them authorized or empowered by the said Commission or otherwise to seise the same Lands, or any part thereof, into the hands of our said Lord the King.

The *Prayer* of the Petition was, that it might be ordered that the said Inquisition and the Return thereof, so far as the same relate to such parts of the said unembanked Salt Marsh Lands as lie within the said Manors of *Saltfleet* and *Skidbroke*, and the Manor and Soke of *Gayton* respectively, might be wholly quashed, annulled and declared void: and the Petitioners further proffered themselves to traverse the said Inquisition and Return, and that they the said Lord *Gwydir* and

1819.

Ex parte
Lord GWYDIR
and another.

William Scrope, and such other Persons having or claiming Common as aforesaid, or some or one of them, might be admitted by the Court at full liberty to traverse the said Inquisition and Return, or to demur to the same or either of them, as they or any of them might be thereto advised, in such manner as the Court should please to order and direct; or that the Court might be pleased to make such other Order for their relief in the premises as the Court should seem meet.

In support of the Petition there were five Affidavits; one by the Petitioner Lord *Gwydir*, two by the Petitioner *Robert Paddison*, one by a Mr. *Dixon*, and another by his Son.

Lord *Gwydir* by his Affidavit stated, "that the Deponent, long before and on the 31st of October 1818, and from that time hitherto, hath been and still is Lord of the Manor of *Saltfleet-cum-Skidbroke* in the County of *Lincoln*, and that, as Deponent hath been informed and believes, there hath been, during the time aforesaid, and still is, a certain large parcel of unembanked Salt Marsh Lands, situate within or adjoining or near to the said Manor, and that he, Deponent, as such Lord of said Manor, before and until the 31st of October 1818, was, and during all the time aforesaid ought to have been, and still of right ought to be, as Deponent believes, either by virtue of a Royal Grant or by Prescription or otherwise, lawfully or equitably seised and possessed of or well entitled to the Freehold and Inheritance of and in the Soil of all the said unembanked Salt Marsh Lands situate within the aforesaid Manor of *Saltfleet-cum-Skidbroke*; and that he, Deponent, and his Ancestors, Lords of the said Manor, and all other Persons whose Estate and Interest this Deponent

hath in said Manor, have been and of right ought to have been, during the time of all such their seisin and possession of said Manor, as such Lords thereof or otherwise, well entitled to the said Salt Marshes as aforesaid."

1819.

Ex parte
Lord GWYDIR
and another.

The Affidavit of *Robert Paddison* stated, " that he hath inspected and perused certain Title Deeds, Court Rolls, Surveys, Plans, legal Proceedings, Judgments and other Instruments, Papers or Documents belonging to *William Scrope*, Esquire, and now in the possession, custody or power of Deponent, and that by the same or some of them it clearly appears to Deponent, and he verily believes and hath no doubt that the said *William Scrope*, as Lord of the Manor and Soke of *Gayton*, parcel of the Honor of *Richmond* Fee aforesaid, and that the several Parishes or Lordships of *North Somercotes*, *South Somercotes*, and *Ganthorpe* otherwise *Grainthorpe-cum-Wragholme*, in the County of *Lincoln*, are included and comprised in said Manor and Soke; and that within the same several Parishes or Lordships of *North Somercotes*, *South Somercotes*, and *Ganthorpe* otherwise *Grainthorpe-cum-Wragholme*, and within said Manor and Soke of *Gayton*, there were long before and upon said 31st of October 1818 last, and from thence hitherto have been and still are divers large parcels of unembanked or uninclosed Salt Marsh Lands, and that the said *William Scrope*, as such Lord of said Manor and Soke, long before and on said 31st of October 1818, was and thenceforth continually hitherto hath been and now is, either by virtue, as Deponent believes, of a Royal Grant, or by Prescription or otherwise, lawfully seised and possessed of or well entitled to the Freehold and Inheritance of and in the Soil of

1819.

Ex parte
Lord GWYDIR
and another.

all the said unembanked Salt Marsh Lands in *North Somercotes* and *South Somercotes* aforesaid; and that said *William Scrope*, his Ancestors, Lords of the said Manor and Soke, as Deponent believes, have been, and of right ought to be, either from time whereof the memory of man is not to the contrary, or for the space of several hundred years, or some other long space of time, so seised and possessed, or otherwise well entitled as aforesaid:—That a certain part of a certain piece of Land, being Salt Marsh, in the Inquisition held and taken at *Cleathorpes*, in the said County of *Lincoln*, on the 12th of November 1818, by *Charles Wray*, *Richard Sandwith* and *Richard Garland*, three of the Commissioners therein named, and returned to and filed in the Petty Bag Office on the 12th December 1818, described as lying near or adjoining to the Lordship of *North Somercotes*, in said County of *Lincoln*, and as containing 380 Acres or thereabouts, is in fact and in truth part and parcel of said unembanked or uninclosed Salt Marsh Lands, in *North Somercotes* aforesaid; and that certain parts of another piece of Land in said Inquisition also described as being Salt Marsh, and as lying near or adjoining the Parishes or Lordships of *North Somercotes*, *South Somercotes*, *Ganthorpe* otherwise *Grainthorpe*, *Wragholme*, and *Marsh Chapel*, in said County of *Lincoln*, and as containing 795 Acres or thereabouts, are in fact and in truth also parts and parcels of said unembanked or uninclosed Salt Marsh in *North Somercotes* aforesaid:—That long before and on said 31st October last there was, and from thence hitherto hath been and still is, a certain large parcel of unembanked or uninclosed Salt Marsh Land, situate within or adjoining or near to the Manor of *Saltfleet-cum-Skidbroke*, in said County of *Lincoln*; and that, as

Deponent hath been informed and believes, said Lord *Gwydir*, as Lord of same Manor, before and until said 31st October 1818 last, was, and during all the time aforesaid ought to have been, and still of right ought to be, as this Deponent verily believes, in some manner seized and possessed of or well entitled to the Freehold or Inheritance of and in the Soil of all the said last-mentioned unembanked or uninclosed Salt Marsh Lands in the said Manor of *Saltfleet-cum-Skidbroke*:—That a certain other part or parcel of said piece of Land, in the said Inquisition described as being Salt Marsh, and as lying near or adjoining to the Lordship of *South Somercotes*, in the said County of *Lincoln*, and as containing 380 Acres or thereabouts, is in truth and in fact part and parcel of the said unembanked or uninclosed Salt Marsh Lands, within the said Manor of *Saltfleet* and *Skidbroke*, in the said Petition of the said Lord *Gwydir* and Deponent mentioned, and whereof said Lord *Gwydir* is in said Petition alleged to be seised and possessed, or otherwise well entitled to, in manner therein mentioned:—That he hath been informed and verily believes, that no Grant or Lease of the said several unembanked or uninclosed Salt Marsh Lands, or any of them, hath, since the taking of the said Inquisition, hitherto been made by the Crown.”

1819.

Ex parte
Lord GWYDIR
and another.

The Affidavit of *William Dixon* stated, “ That he hath, for the space of 58 years past, invariably resided within the Manor of *Saltfleet-cum-Skidbroke* aforesaid:—That long before the commencement of such period of his Residence, as Deponent hath truly been informed and he verily believes, and during the whole of the same period, there have been and now are divers large pieces or parcels of unembanked Marsh Lands within

1819.

Ex parte
Lord GWYDIR
and another.

said Manor, lying and being between the Sea Bank or Sea Wall between said Manor and the Sea Shore or Sea Beach, at the time of ordinary Tides, within said Manor:—That the said Lord *Gwydir*, his Predecessors and Ancestors, have, as Deponent hath been informed and verily believes, immemorially been Lords of the said Manor, and Owners of the Soil of said Salt Marsh Lands and Sea Beach or Sea Shore within said Manor; and that Lord *Gwydir*, for many years last past, hath been and now is the Lord of said Manor and the Owner of such Soil as aforesaid:—That the several Owners of certain Messuages, Cottages, Farms and Lands within said Manor immemorially have had, now have, and as Deponent verily believes ought of right to have, for themselves and their Farmers and Tenants of the same Messuages, Cottages, Farms and Lands respectively, for his and their Cattle, *levant and couchant*, upon their said respective Messuages, Cottages, Farms and Lands, Common of Pasture in and upon such parts of said unembanked Salt Marsh Lands as have lain or now lie within said Manor, wherein said Messuages, Cottages, Farms and Lands are respectively situate, or some or one of them, or have had, now have, and of right ought to have some other good, lawful, valid and sufficient Right, Title and Interest therein and thereto.”

The Affidavit of *William Dixon*, junior, stated, “ that he hath, for the space of 58 years last past, invariably resided within the Parish of *Saltfleet-cum-Skidbroke* aforesaid, adjoining *North Somercotes*, in the said County:—That the same Parish of *North Somercotes* is situate within or part of the Manor and Soke of *Gayton*, in said County, parcel of the Honor of *Richmond* Fee:—That long before the commencement of such period of

1819.

Ex parte
Lord GWYDIR
and another.

his Residence, as Deponent hath frequently been informed and verily believes, and during the whole of the same period there have been and now are divers large pieces or parcels of unembanked Salt Marsh Land within the said Parish of *North Somercotes*, and within the said Parish of *South Somercotes*, also situate within and part of said Manor and Soke of *Gayton*, lying and being within the Sea Bank or Sea Wall within said Parishes of *North Somercotes* and *South Somercotes*, and the Sea Shore or Sea Beach, at the time of ordinary Tides, within the same Parishes:—That said *William Scrope*, his Predecessors and Ancestors, hath, as Deponent hath been informed and verily believes, immemorially been Lords of the said Manor and Soke of *Gayton*, and Owners of the Soil of said Salt Marsh Lands or Sea Beach or Sea Shore within said Manor and Soke, and that said *William Scrope*, for many years last past, hath been and now is the Lord of said Manor and Soke, and the Owner of such Soil as afore-said:—That the several Owners of certain Messuages, Cottages, Farms and Lands within said several Parishes of *North Somercotes* and *South Somercotes*, or one of them, immemorially have had, now have, and as Deponent verily believes, of right ought to have, for themselves and their Farmers and Tenants of the same Messuages, Cottages, Farms and Lands respectively, for his and their Cattle, *levant and couchant*, upon their said several Messuages, Cottages, Farms and Lands, Common of Pasture in and upon such parts of said unembanked Salt Marsh Lands as have lain or now lie between said several Parishes of *North Somercotes* and *South Somercotes* respectively, whereon said Messuages, Cottages, Farms and Lands are respectively

1819.

Ex parte
Lord GWYDIR
and another.

situate, or some or one of them, or have had, now have, and of right ought to have some other good, lawful, valid and sufficient Estate, Right, Title and Interest therein and thereto."

The further Affidavit of *Robert Paddison* stated, "that on or about the 29th April 1812, a certain Sloop, called the *Neptunus*, with a Cargo of Timber and Deals laden therein, was wrecked upon the Sea Shore of *North Somercotes*, within the Manor and Soke of *Gayton* in the said County, parcel of the Honor of *Richmond* Fee:—That the said Sloop and Cargo were thereupon taken possession of and marked as Wrecks by *James Neve*, Esquire, the then Lessee and Tenant of such of the said Manor and Soke as is comprised within the Parish Limits or Boundaries of *North Somercotes* aforesaid, under the said *William Scrope*, as the then and now Lord of the said Manor and Soke:—That the said Sloop and Cargo were soon afterwards seized, taken and sold, as alleged Droits of the Admiralty, from and out of the possession of the said *James Neve*, by *Anthony Atkinson*, of the Town and County of the Town of *Kingston-upon-Hull*, Esquire, and *Joseph Hinds*, of *Marsh Chapel*, in the said County of *Lincoln*, Yeoman, under and by virtue of a Warrant for that purpose, under the Hand and Seal of the then Registrar of the High Court of Admiralty, dated on or about the 4th May 1812:—That an action of Trover was thereupon soon afterwards commenced in his Majesty's Court of King's Bench at *Westminster*, by the said *James Neve* against the said *Anthony Atkinson* and *Joseph Hinds*, for the recovery by him the said *James Neve*, from them the said *Anthony Atkinson* and *Joseph*

Hinds, of the said Wrecks so seized, taken and sold by them as aforesaid:—That the said Action was tried before Mr. Justice *Bayley*, at the Assizes held at the Castle of *Lincoln*, in and for the County of *Lincoln*, in the month of July 1817, when a Verdict was given therein for the said *James Neve*, the Plaintiff in the said Action; and that final Judgment thereon for the said Plaintiff, against the said *Anthony Atkinson* and *Joseph Hinds*, the Defendants in the said Action, was afterwards entered of Record in the said Court of King's Bench; and that as a principal ground of the Defence of the said *Anthony Atkinson* and *Joseph Hinds*, on the trial of the said Action, it was on their part contended and endeavoured by Evidence to be proved, that neither the said *William Scrope*, as Lord of the Manor and Soke of *Gayton* aforesaid, nor the said *James Neve*, as his Lessee as aforesaid, had any Right or Title to any part of the Land or Sea Shore lying between the present Sea Bank or Sea Wall and the low-water-mark in *North Somercotes* aforesaid; but this Deponent further saith, that the Right and Title of the said *William Scrope*, as Lord of the said Manor and Soke, and of the said *James Neve*, as his Lessee as aforesaid, to the whole of the same Land or Sea Shore, were upon the said Trial fully proved and substantiated to the satisfaction of the Court and the Jury, by a certain Grant of King *Henry* the Eighth to the Duke of *Suffolk*, and by a great variety of other authentic, recorded, written, documentary and oral Testimony:—That on the 12th day of November last, the day on which the above-mentioned Inquisition was held at *Cleathorpes* aforesaid, he this Deponent did sign and deliver to *William Wilson*, of *Louth* aforesaid, Gentleman, a Claim and Notice in writing in the words

1819.

Ex parte
Lord Gwydir
and another.

1819:

Ex parte
Lord GWYDIR
and another.

following; (that is to say), "To the Commissioners Commissioners authorized to take an Inquisition respecting certain Waste or Derelict Lands in several Parishes on the Coast of *Lincolnshire* :—

" Gentlemen,

" On behalf of the Lord of the Manor and Soke of *Gayton*, parcel of the Honor of *Richmond Fee*, and also on behalf of the Freeholders and Commoners in the several Parishes of *Grainthorpe*, *North Somercotes*, *South Somercotes*, *Saltfleetley Saint Peters*, *Saltfleetley All Saints*, and *Saltfleetley Saint Clements*, in the said County, I hereby claim all the Waste and Derelict Lands in the same several Parishes respectively, and give you Notice that, either this day or to-morrow, I shall appear before you to make such Claim in person.—I am, Gentlemen, your very obedient servant,

" *Robert Paddison.*"

" *Louth*, Nov. 12, 1818."

And that he this Deponent at the same time did request the said *William Wilson*, who promised to deliver the said Claim and Notice to the Commissioners who attended upon the said Inquisition; but this Deponent further saith, that upon his arrival at *Cleathorpes*, between eleven and twelve o'clock in the forenoon of the thirteenth day of November last, he this Deponent was informed by the said *Charles Wray*, *Robert Sandwith*, and *Richard Garland*, three of the said Commissioners who were then at *Cleathorpes* aforesaid, and also by the said *Anthony Atkinson*, who was also there at the same time, that the said Inquisition had been terminated, and the return thereto made, on the day before the arrival of this Deponent at *Cleathorpes* as aforesaid :—That he hath been informed, and verily believes and has

no doubt, that the said Commission was issued upon and in consequence of certain information given by or through the said *Anthony Atkinson*, as to the said Salt Marshes, to his Majesty's Commissioners of Woods and Forests, or to some other Person or Persons in some official department of the Land Revenue of the Crown of the Realm.

1819.

Ex parte
Lord GWYDIE
and another.

Mr. *Bell*, Mr. *Heald*, and Mr. *Barber*, in support of the Petition:—

This Petition is founded on several Statutes; the 34 Edw. 3; 36 Edw. 3, c. 13; 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; 1 Hen. 8, c. 8. These Statutes give a Traverse in every case, whether it be the case of an Escheat or of any other Right; and though the Statutes mention only the Chancellor, yet we apprehend your *Honor* has jurisdiction, as appears in the Case of *Ex parte Webster (a)*, determined by the *Master of the Rolls*; and also by your *Honor's* Predecessor, in *Ex parte Sadler (b)*.

We contend, that this Inquisition ought to be quashed, or that we ought to be allowed to traverse it, on the ground, that the finding of the Jury was not such as to entitle the Crown. The Commission was to inquire "whether there be any and what Lands, and how many Acres of Land, in or adjoining or near to the several Towns, Parishes or Lordships aforesaid, or any or either of them, in our County of *Lincoln* aforesaid, being Land in time past covered with the Water of the Sea, and now by the Sea left and not covered with Water, which to us

(a) 6 Ves. 809.

(b) *Ante*, 1 Vol. 581.

1819.

Ex parte
Lord GWYDIR
and another.

in right of our Crown of our said United Kingdom, or in any other right do belong and appertain." They therefore were not merely to inquire whether it was Land formerly covered by the Sea and now left by the Sea, but also whether it belongs to the Crown. Now the Jury find that the Land "was in times past covered with the Water of the Sea, and is now and has been for several years past by the Sea left and not covered with Water, except at high Tides, when the Sea doth flow to the said Wall or Sea Bank, and which Land from the time of such dereliction hath been and still is unoccupied." They state the time the Land was unoccupied, but they do not find whether it belonged to the King or any other person, but they state what shows that it was not wholly unoccupied, for they say, "that the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep belonging to the Tenants or Occupiers of Land situate within the said Sea Bank or Sea Wall in the said Town, Parish or Lordship of *North Somercotes*." This finding, therefore, is alone sufficient to entitle us to a Traverse, and to send the Case to a Jury. That the Crown is *prima facie* entitled to what is called the Shore of the Sea, what lies between high and low-water-mark, is admitted; but a Subject may be entitled to it, either by Grant or Prescription, or as parcel of a Manor. The whole of this subject is discussed in the Treatise of Sir *Matthew Hale*, *De Juris Maris*, in Mr. *Hargrave's Law Tracts* (c). His words are, "I come now to those other parts of Propriety which a Subject may have by Prescription or Usage, viz. the Sea Shore and maritime Increases; which, though we have before stated to belong

1819.

Ex parte
Lord GWYDIR
and another,

prima facie to the King, yet they may belong to the Subject in point of propriety, not only by Charter or Grant, whereof there can be but little doubt, but also by Prescription or Usage. First, the Shore of the Sea. There seem to be three sorts of Shores, or *littora maritima*, according to the various Tides: 1st, The high Spring Tides, which are the fluxes of the Sea at those Tides that happen at the two Equinoctials, and certainly this doth not, *de jure communi*, belong to the Crown; for such Spring Tides many times overflow ancient Meadows and Salt Marshes, which yet unquestionably belong to the Subject, and this is admitted of all hands: 2nd, the Spring Tides which happen twice every month at full and change of the Moon, and the Shore in question is by some opinion not denominated by these Tides neither, but the Lands overflowed with these fluxes ordinarily belong to the Subject *prima facie*, unless the King hath a prescription to the contrary; and the reason seems to be, because for the most part the Lands covered with these fluxes are dry and manmiorable, for at other Tides the Sea doth not cover them; and therefore touching these Shores some hold that common right speaks for the Subject, unless there be an usage to entitle the Crown, for this is not properly *littus maris*; and therefore it hath been held, that where the King makes his title to Land as *littus maris*, or *parcella littoris marini*, it is not sufficient for him to make it appear to be overflowed at Spring Tides of this kind. P. 8, Car. 1, in *Camera Scaccarii*, in the Case of *Vanhesdanke*, for Lands in *Norfolk*; and so I have heard it was held, P. 15, Car. B. R. Sir *Edward Heron's* Case, and Tr. 17, Car. 2, in the Case of the Lady *Wandesford*, for a Town called the *Cowes* in the *Isle of Wight*, in *Scaccario*. 3rd. Ordinary Tides of

Vol. IV.

1819.

Ex parte
 Lord GWYDIR
 and another.

Neap Tides, which happen between the full and change of the Moon, and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*: and touching this kind of Shore, viz. that which is covered by the ordinary flux of the Sea, is the business of our present inquiry." You will observe that he says "there is a piece of Land which has not been covered with Water till the Sea flowed to the said Sea Wall or Sea Bank;" that is the way he describes it, and it seems to belong to the Case of *Alluvium*. This Author goes on to say; "1st, This may belong to a Subject. The Statute of 7th Jac. cap. 18, supposeth it; for it provides, that those of *Cornwall* and *Devon* may fetch Sea Sand for the bettering of their Lands, and shall not be hindered by those that have their Lands adjoining to the Sea Coasts, which appears by the Statute they could not formerly. Vide *Carta Antiqua*, D.D. n. 24., the Charter of *Alan de Percy* to the Monks of *Whitby*, and the bounds thereof, viz. *totam marinam a porta de Whitby, usque Blourck, &c. et usque Terdiso et usque in mare, et per marinam in Whitby*, confirmed by King Henry 1st. And the bounds of that Abbey's Possessions take in many Creeks of the Sea, yet are given by a Subject, viz. *Derwent, Muse, Eae, &c.* 2d, It may not only belong to a Subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a Manor. And thus it is agreed, 5 Rep. 107, in *Sir Henry Constable's Case*, and the Book of 5 E. 3. 3, cited accordingly. And according to this was the resolution cited Dyer, 316, to be between *Hammond* and *Digges*, P. 17 Eliz. And accordingly it was decreed in the *Exchequer Chamber*, P. 16 Car. inter *Attorney General*, et *Sir Samuel Roll*, *Sir Richard Buller* et. *Sir Thomas Arundel*, per omnes Barones.

1819.

Ex parte
Lord Gwydd
and another.

And the evidences to prove this fact are commonly these; constant and usual fetching Gravel and Sea Weed and Sea Sand between the high-water and the low-water-mark, and licensing others so to do; inclosing and embanking against the Sea, and enjoyment of what is so inned; enjoyment of Wrecks happening upon the Sand; presentment and punishment of Purprestures there in the Court of a Manor, and such like." Your Honor observes that he points out assignment of Wrecks; for he says, "And as it may be parcel of a Manor, so it may be parcel of a Vill or Parish, and the evidence for that would be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the Parson Sutton, about 14 Car. had a Verdict for the Tythes of Sutton Marsh in Lincolnshire, upon a long and great evidence, though it appeared that within time of memory it was the mere Shore of the Sea, covered at ordinary Tides, and without the old Sea Bank. 3rd, It may not only be parcel of a Manor, but *de facto* it many times is so, and perchance it is parcel almost of all such Manors as by Prescription have Royal Fish or Wrecks of the Sea within their Manor." Now with respect to *Scrope's* Manor you will find that the question has been tried with the Crown as to a Wreck; and the same Author upon that says, "For, for the most part, Wrecks and Royal Fish are not nor indeed cannot be well left above the high-water-mark, unless it be at such extraordinary Tides as overflow the Land; but these are Perquisites which happen between the high-water and low-water-mark; for the Sea withdrawing at the ebb leaves the Wrecks upon the Shore, and also those greater Fish which come under the denomination of Royal Fish; he therefore that hath Wreck of the Sea or Royal

1819.

Ex parte
Lord GWYDIR
and another.

Fish by Prescription *infra manerium*, it is a great presumption that the Shore is part of the Manor, as otherwise he could not have them." He then sets out that this is consonant to the pleading in Sir Henry Neville's Case, 5 Edw. 3. 3, and *Rastall's Entries*, 684; and afterwards he adds, "Thus much shall suffice concerning the Shore or space between the high-water and low-water-mark, which may belong to a Subject, and be parcel of his Manor. Second: Let us now come to the *maritima incrementa*; viz. *alluvio maris, recessus maris, et insula maris*. 1st, For the *jus alluvionis*, which is an increase of the Land adjoining by the projection of the Sea casting up and adding Sand and Slubb to the adjoining Land, whereby it is increased, and for the most part by insensible degrees. *Bracton*, lib. 2, cap. 2, writes thus: '*Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum*,' &c. Then he goes on to quote a further passage, and says, but *Bracton* follows the Civil Law in this, and some other following places. "And yet, even according to this, the Common Law doth regularly hold at this day between Party and Party; but it is doubted in case of an arm of the Sea, 22 Ass. 93. This *jus alluvionis*, as I have before said, is *de jure communi*, by the Law of England the King's; viz. if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known *idem est, non esse et non apparere*, as well in maritime increases as in the increases by inland Rivers. But yet custom may, in this case, give this *jus alluvionis* to the Land whereunto it accrues. This is made out very plainly by these ensuing Records." *Callis*, on *Sewers*, speaks the same language; but it is not necessary to refer to *Callis* particularly, inasmuch as it is scattered through-

out his Book; and it is spoken of by Lord *Hale* more particularly, who refers to *Constable's Case* in 5 *Coke's Reports*, 107, in which it is said thus—"In this Case it was resolved by the whole Court, that the Soil upon which the Sea flows and ebbs, viz. between high-water-mark and low-water-mark, may be parcel of the Manor of a Subject, 16 *Eliz. Dyer*, 316, acc.; and so it was adjudged in *Lacy's Case*, Trin. 25 *Eliz.* in this Court. And yet it was resolved, that when the Sea flows, and hath *plenitudinem maris*, the Admiral shall have Jurisdiction of every thing done upon the Water, between the high-water and low-water-mark, by the ordinary and natural course of the Sea: And so it was adjudged in the said Case of *Lacy*, that the Felony done upon the Sea, *ad plenitudinem maris*, between the high-water and the low-water-mark, by the ordinary and natural course of the Sea, the Admiral should have Jurisdiction of; and yet when the Sea ebbs the Land may belong to a Subject; and every thing done upon the Land, when the Land is ebbed, shall be tried at the Common Law, for the same is then parcel of the County, and *infra corp' comitat'*, and therewith agrees 8 E. 4. 19 a. So note, that below the low-water-mark the Admiral has the sole and absolute Jurisdiction; between the high-water-mark and the low-water-mark the Common Law and the Admiral have *divisum imperium*, interchangeably, as is aforesaid, &c. one *super aquam*, and the other *super terram*. And Sir *John Popham*, Chief Justice, said, that on Trial at *Nisi Prius* between the *City of Bristol* and the *Lord Berkley*, it was held by the *Justices of Assize*, that where the *Lord Berkley* had a Manor adjoining to the *Severn*, and prescribed to have Wreck within his Manor, and certain Goods floated between the high-water-mark and low-water, and the *City of Bristol*

1819.

Ex parte
Lord GWYDIR
and another.

1819.

Ex parte
Lord GWYDIR
and another.

had Flotsam there; that the said Goods were not Wreck as long as they were floating upon the Water between high-water-mark and low-water. See the Book 5 E. 3. 3. a. in a Replevin brought by *William de Newport*, of London, against Sir *Henry Nevill*, and declared that the Defendant took three Lasts of Herrings and a Ship; the Defendant pleaded that he was Lord of the Manor of *Walring*, and prescribed to have Wreck within his Manor *a tempore cuius*, &c. and that the Herrings and Ship were Wreck within his Manor. To which the Plaintiff said, that they were our Goods in the keep of our Mariners which arrived by the Sea; and we say, that he took them out of their Custody: Judgment if he can claim as Wreck? To which the Defendant said, that we took them as Wreck out of all custody. Upon which Book I observe three things: first, that Wreck may be claimed by Prescription; second, that forasmuch as a Ship cannot be Wreck, &c. cast on the Land, but between the high-water and low-water-mark, thence it follows that that was parcel of the Manor; third, if the Ship perishes, yet if any of the Servants escape, the Law saith that they have the Custody of the Goods, and they are not Wreck, 39 E. 35 a. b. One prescribed to have Royal Fish, as Porpoises, &c. found within his Manor, which seems to be between the high-water and low-water-mark." There are scattered passages in *Callis on Sewers* to the same effect. A note also on this subject is to be found in *Hargrave's Co. Litt.* 261, a. n. 1. In the conclusion of that note he says, "Having thus shown in whom the Soil of the Shore and of Ports belong by common right, it remains to state succinctly the nature of the Evidence by which the right to it may be proved to exist in another. It may be done by show-

ing that he and those under whom he claims have immemorially, frequently and without restriction to any part of the Soil, dug Gravel, fetched away Sea Weed or Sand, or embanked against the Sea. If it is claimed to be part of a Manor, the right of Commonage for the Cattle of the Lord and the Tenants, the prosecution and punishment of Purprestures in the Court of a Manor, its being included in the Perambulations, and every other act by which the right to the Soil of inland Property is established, may be given in evidence in support of it. The right to Wreck of the Sea, or Royal Fish, by Prescription *infra manerium*, is a strong presumption for the Shore's being parcel of the Manor. Lord Hale's expression is very strong: "Perchance," says he, "the Shore is parcel almost of all such Manors as by Prescription have Royal Fish or Wrecks of the Sea within their Manor;" but it should be observed, that though Wreck frequently is a parcel of a Manor, it is a Royal Franchise. Like other Royal Franchises it belongs of common right to the Crown; but by Grant or by Prescription it may and in fact frequently does belong to a Subject, sometimes in gross, but oftener as parcel of his Manor, Parish or Vill, adjacent to the Sea."

1819.

Ex parte
Lord Gwydir
and another.

THE VICE CHANCELLOR:—

If, as you state, the finding of the Jury is imperfect, and that no right is found to be in the Crown, what part of the Inquisition do you wish to traverse? You do not dispute that this Land was once covered with the Sea, and that it is now covered by extraordinary Tides. There must be some fact found upon which you can tender an Issue; something to traverse; a Title in opposition to that found in the Inquisition to be in the Crown; but you say that

1819.

Ex parte
Lord GWYDIE
and another.

the Jury do not state any Title in the Crown; what is there then to traverse? The Jury find that the Land is occupied as Common by the Tenants of the Manor, and therefore the Land, on the finding of the Jury, appears, *primâ facie*, to be part of the Manor within the Parish of *North Somercotes*. If no Title is found in the Crown by the Inquisition, but the Commissioners, nevertheless, on the part of the Crown, take possession of the Land, they would be liable to an Action of Trespass; they could not justify under an Inquisition which gives them no Title. The points to be considered in this Case are these: 1st, Whether there be a right to traverse an Inquisition of this nature? 2dly, Whether this particular Inquisition vests any right in the Crown, and is therefore traversable? 3dly, Supposing the Inquisition vests a right in the Crown, and is traversable, whether the Evidence adduced on this Petition, of your Title to the Land, is such as to show a *primâ facie* Case against the Crown, and therefore to render it fit to allow the Inquisition to be traversed?

Counsel in support of the Petition continued—

The authorities show a right to traverse if we make a Case. The Crown has considered the Inquisition as conferring a right of seizure on its behalf, for it has seized the Lands, and we shall now show the Title which the Petitioners set up to this Land.

[They then stated the Affidavits in support of the Petition, which have been already set forth.]

We thus show an Occupation for a great number of years. An Occupation of sixty years, or for a much shorter period, is sufficient to prevent a Possession being

disturbed: *Attorney General v. Carver* (d). The *Nullum Tempus* Act (e) limits Claims of the Crown to sixty years before the commencement of the Suit or Proceeding for the recovery of the Estate claimed.

1819.

Ex parte
Lord GWYDIR
and another.

Under all the circumstances, therefore, we submit, that the Inquisition ought to be quashed, or that the Petitioners should be allowed to traverse it.

The VICE CHANCELLOR :—

The Crown may apply to quash an Inquisition, but the Subject cannot. Where an Inquiry miscarries, and a *melius inquirendum* is necessary, the application is made on the part of the Crown, to quash it. The only question is, whether you should be allowed to traverse it?

The *Solicitor General* (f), *Mr. Roupell*, and *Mr. Pemberton*, against the Petition :—

If, as it is contended, the finding of the Jury is defective, the Petitioners cannot be prejudiced, and liberty to traverse is unnecessary. The first question is, Whether this be a Case in which a Subject is allowed to traverse? And if so, 2dly, Whether the finding of the Jury is good or bad? 3dly, Whether the Petitioners have, by their Affidavits, shown a good Title?

By the Common Law no Traverse was allowed (g) in Cases of this description. The only mode of proceeding by the Common Law in these Cases was by a *Petition of Right*, or a *Monstrans de Droit*.

(d) 1 Dow, 316.

(e) 9 Geo. 3, c. 16.

(f) Sir John Gyfford.

(g) 4 Co. 56, a; Staunf.

Prær. 60, b.

1819.

Es parte
Lord GWYDIR
and another.

The Jury find, that this Land was originally covered by the Sea; that it was derelict by the Sea; and being derelict Land, that it belongs to the Crown. The *prima facie* Title is in the Crown. The right to the Land may be lost by Grant, or by Prescription, which supposes a Grant, but no Evidence is produced of any such Grant, or of Usage, which gives a Title by Prescription; there is no proof of that continued Usage that gives a Title. It is so short a time since these became derelict Lands, that a prescriptive right could not have arisen.

Are there then any Statutes which give a right to Traverse in a Case like this? They give a right of Traverse in some Cases, but not in all. The Statutes cited do not apply to the present Case; they apply only to Escheators, but this is not a case of Escheat; they apply to Forfeitures, but this is not a Forfeiture; they apply to cases of Lunacy, but this is not a case of that description. The 34 Edw. 3, c. 14, a Statute not cited on the other side, applies to Traverses of Office found before *Escheators*. The subsequent Statute of the 36 Edw. 3, applies only to an Escheat, which this is not; to such a Commission as falls within that Statute, or the previous Statute which apply only to Escheators. Lord Coke holds (*h*), that although there be only one instance of Escheator mentioned in the Act, it would apply to all cases of Escheat; but he does not say it is applicable to other cases.

The next Statute referred to is the 8th Hen. 6, c. 10; this Statute applies only to Inquests or Commissions by Escheators; it is only a repetition of

the previous Statute of the 36 Edw. 3, before adverted to.

1819.

The VICE CHANCELLOR:—

Ex parte
Lord Gwydir
and another.

Does not that Statute apply to *all* Rights by which Lands are seized as Lands of the Crown, or as the Lands and Property which ought to belong to the Crown?

Solicitor General continued:—

I apprehend not; for by the Statute of the 2d & 3d Edw. 6, c. 8, s. 7, a remedy is given by Traverse or *Monstrans de Droit*, in respect of Persons unduly found, by Office or Inquisition, to be attainted and their Lands forfeited. Supposing the 8th of Hen. 6, extended to *all* cases where the King's Title was found, either by Escheator or before the Commissioners, the Statute of Edw. 6, would have been unnecessary. The Common Law does not allow of a Traverse; and no Statute has been cited which gives a Traverse in a Case like the present. The Statutes that have been relied upon apply to an Escheator, to cases of Forfeiture, to cases of Idiocy and Lunacy, but not to a Case like the present, where the Land is claimed as belonging to the Crown by its prerogative, as the general Guardian of the Shores of the Realm. Persons considering themselves aggrieved, may proceed by Petition of Right, and may thereupon show a paramount Title, but they cannot insist on a right to apply for leave to traverse the Inquisition. There is no Case in the Books where such a Traverse has been allowed, or where the right to it has been discussed. The absence of any such Case affords a strong presumption against the right claimed to traverse. In

1819.

Ex parte
Lord GWYDIR
and another.

the reign of *William and Mary* there are Cases in which Lands were seized by the Crown near this very spot, and granted; and part of the Lands now in question were seized in 1632.

Supposing they have a right to traverse, they must first show that they have a fair ground of Right and Title to these Lands. In the Case *In re Sadler* (i), a case of Escheat, the late *Vice-Chancellor* (k) refused leave to traverse, because a sufficient Title had not been shown; and in *The King v. Bishop of Worcester* (l), it is expressly laid down, that in order to be allowed to traverse, a Title must be shown. Have then these Petitioners shown a Title to the Lands? Lord *Gwydir* does not venture, either by himself or his Agent, to state his Title to the Lands; he only says, "they are in or near or adjoining to and parcel of the Manor;" but he does not say that they are parcel of the Manor; he only says, "that he is Lord of the Manor of *Saltfleet-cum-Skidbroke*;" but he does not say that these Lands have ever been enjoyed as part of the Manor, or that he is entitled to this Waste Land; he says he has Title to the Lands "by Grant, or by virtue of a Royal Prescription, or otherwise lawfully or equitably possessed of or well entitled to the Freehold and Inheritance of and in the Soil of all the said unembanked Marsh Lands, &c." His Lordship's Affidavit is followed by that of a professional Gentleman, Mr. *Paddison*, who has examined the Title Deeds, Papers and Documents belonging to *William Scrope*, Esq. and now in his possession, and has examined all Lord *Gwydir's* Title Deeds; and what does he say? "that

(i) *Ante*, 1 Vol. p. 581.

(l) *Vaughan*, 62.

(k) *Sir Thomas Plumer*.

Lord *Gwydir* is entitled to these Lands by Grant, or Prescription, or otherwise." If there were any Royal Grant it would have been produced, it must have been among the Title Deeds; if the Right were by Prescription, he would state the particulars; instead of that, he only says, that some way or other, (for that is the effect of his Affidavit,) the Persons are entitled, but he cannot tell how. Is that sufficient? He is bound to set out his Title. If he has any Grant he should show it; if he claims by Prescription he should show Usage. It is said a Title is shown of more than sixty years Possession, but where is that shown? There is nothing of the kind.

1819.

Ex parte
Lord GWYDIR
and another.

The Jury find, that "the Lands have hitherto been and still are unoccupied, but the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep belonging to the Tenants or Occupiers of Land situate within the said Sea Bank or Sea Wall, in the said Town or Parish or Lordship of *North Somercotes*." But that fact is in its nature equivocal and loose, particularly as to Property in this situation. This is not such an exhibition of Title as is sufficient to induce the Court to allow a Traverse.

They set up a Claim as if there were a *prima facie* Title in them from the Crown, but they must show some stronger Title; if they had shown a prescriptive Possession for thirty or forty years, the Case would have been different, but they do not venture to state what their Title is, or in what particular manner it originated; they say they are entitled either in this way or in that, but they state nothing which can be tried or traversed. They should show such a Title as to be able to put it on

1819.

*Ex parte*Lord Gwydder
and another.

Record, and such as the Crown might demur to or traverse.

The Inquisition is either good or bad; if good, they have no right to traverse; if bad, they cannot be injured by it. If the Crown seizes under the Inquisition, they have a remedy by Action of Trespass or Ejectment against the Person taking Possession. The Inquisition showed a *prima facie* Title in the Crown, and put it upon them to show they had a Title, which entitled them to traverse. The Evidence contained in the Affidavits does not show a Title; and according to *Sadler's Case (m)*, and the Case in *Vaughan*, they must show a Title before they can ask the indulgence of the Court for leave to traverse. If by Law they can traverse in such a Case as this, they have not shown a Title sufficient to induce the Court to allow them to traverse.

Mr. Bell, in reply :—

The Counsel for the Crown have argued, that the finding of the Jury is a good finding; that this is a Case in which a Traverse is not allowed; and that we have shown no Right to these Lands.

With respect to the finding of the Jury—

The VICE-CHANCELLOR :—

Whether this be a good finding is a mere question of Law, and on the Traverse that question would be tried. Whatever may be my Opinion, it is not for me to decide whether there is, or not, any finding which is traversable. If the Party is entitled to traverse I shall leave him to take his own course in a Court of Law.

(m) *Ant.*, 1 Vol. p. 581.

Mr. Bell, continued :—

In your Honor's view of the subject, it does not appear necessary to say any thing more with respect to the finding of the Jury.

1819.

Ex parte
Lord GWYDIA
and another.

With respect to the right of Traverse, it appears from *Comyns's Digest* (n), that the 8th Hen. 6, c. 16, extends to all Persons aggrieved by Inquests, and not merely to Cases of Escheat. The Statutes show, that it was the intention of the Legislature that there should be a Traverse in every Case, whether of Escheat, or otherwise, where a Party was deprived of his right. They ask us to produce any Case like the present, in which a Traverse was allowed. We may ask in return, whether, with all the information the Crown possesses, they can produce any Case like the present, in which a Traverse has been refused? It is for the other side to show we have no right to traverse. It is said that the Language of the 2d & 3d Ed. 6, c. 8, allows a Traverse in a particular Case only, and that it would have been unnecessary if, before that Statute, a Traverse might have been obtained in all cases. The reason of passing that Statute is stated in *Comyns's Digest*, and it appears to have originated from a doubt, whether the former Statutes, which gave a Traverse, applied where there was a double finding on Record, and by that Statute a power of double traversing was given in such Case. *Starnford* (o), after observing on the Stat. of Hen. 8, says, "And, therefore, in all cases where the King is entitled by Office, the Party grieved may traverse the point by which the King is entitled; as if an Office finds a Tenure *in capite*, the

(n) Com. Dig. Prerog. 83,
84.

(o) De Prer. 62, &c. quoted
Com. Dig.

1819.

Ex parte
Lord GWYDIR
and another.

Tenant may traverse the finding:" and in another place(p) he says, " In all Cases before the Escheator, the Party should have his Traverse, and also in all Cases by Office found. The last Statute allows the traversing to all Offices found before the Escheator, as well as to that before the Commissioners." *Comyns* adopts this doctrine in his *Digest*; and his authority, particularly on these subjects, as *Lord Chief Baron of the Exchequer*, is very high. It is for the other side to show what Commissioners, and what Commissions, were meant by the Statute, and to distinguish this Case out of the fair grammatical import of the words of the Acts.

Then have we made out such a Title as is sufficient to entitle us to permission to traverse? I admit we must make out a Title, as was held in *Ex parte Webster* (q), and in *Ex parte Sadler* (r).

It does not appear by the finding of the Jury whether this was a tract of Land suddenly left by the Sea, or by gradual alluvion. In the former case it belongs to the Crown, in the latter to the Subject whose Land adjoins. The Jury tell us, it was formerly covered with the Sea, but they say it has for several years past been left by the Sea, and is not covered with Water except at high Tides; the finding, therefore, leaves it uncertain to whom the Land belongs. Supposing the Land to have been suddenly left by the Sea, the Subject may nevertheless have become entitled by Grant, or by Prescription which supposes a Grant. They object that we do not positively state how our Right arises; but

(p) De Prær. 62.

(r) *Ante*, Vol. 1. 581.

(q) 6 Ves. 809.

1819.

Ex parte
Lord GWYDIR
and another.

the Petitioners state a Possession as Lords of the Manor, and their belief as to a Title by Grant, or Prescription, or otherwise. According to Lord *Hale* and Lord *Coke*(s), when the Lord of the Manor is entitled to Wrecks, he has a right also to the Soil. The right of Wreck has been tried by one of the Petitioners, Mr. *Scrope*, it having been claimed as a *Droit of the Admiralty*, and it was held that he was entitled to the Soil, and by consequence to the Wreck. That Case applied only to Mr. *Scrope*'s Lands, but it establishes the fact, that in the adjoining Manor the Tenants had constantly exercised Commonable Rights. Whenever Tenants of a Manor exercise a Right of Common, it forms *prima facie* Evidence that the Right to the Soil is in the Lord of the Manor. Evidence of Right may appear by carrying away Sea Weed, or by digging or taking away the Soil. If no such Evidence is here adduced, it probably is because there is no Sea Weed, and the Soil cannot be used as it is in some other parts of England. We prove that it has been constantly depastured by Cattle of Tenants of the Manor. In questions of Boundary, it has always been considered as sufficient to show, by the depasturing of Cattle for a series of years, that it belongs to the Lord of the Manor. Upon the whole, we contend that the Petitioners have sufficiently shown such a Title as entitles them to permission to traverse.

The VICE CHANCELLOR:—

This is a Case in which the Crown has thought fit to direct a Commission to certain Gentlemen named, to inquire, with the assistance of a Jury, whether certain

(s) *Sir Henry Constable's Case*, 5 Rep. 106 b.

1819.

Es parte
LORD GWYDIR
and another.

Lands adjoining or near to certain Parishes in *Lincolnshire*, were in times past covered with the Sea, and are now by the Sea left, and not covered with Water; and whether they belong to, and have been unjustly subtracted from, the Crown? The Commissioners have returned an Inquisition, by which it appears that the Jury have found certain Facts; and Lord *Gwydir* objects, that he is prejudiced by such finding; and that the Inquisition and Return ought therefore to be quashed, or that he ought to be permitted to try the truth of these Facts by Traverse. I have already stated, that an Inquisition cannot be quashed upon the application of a Subject. The first Question is, Whether there be any right in the Subject to traverse an Inquisition of this nature; and it is argued for the Crown upon the Statutes stated, that the right of the Subject to traverse is confined to Cases in which the Crown claims Property by reason of the incidents of Tenure. Upon consideration of the several Statutes referred to, they appear to me rather to be made to regulate the exercise of an acknowledged right, than to create that right; and it is to be inferred, from the language of some of the Statutes, that the right of the Subject to traverse was then admitted in every Case in which Property was found in the Crown by Inquisition, and not merely in Cases arising out of Tenure.

The *Vice-Chancellor* then proceeded to read and comment upon the several Statutes,—and continued.—

My Opinion therefore is, that there is a general right in the Subject to traverse every Inquisition by which Property is found to be in the Crown; and, consequently, a right to traverse an Inquisition of the nature in question.

The next consideration is, Whether Lord *Gwydir* has made out a Case which authorizes the Court to permit his Traverse? In other words, whether Lord *Gwydir* has made out a *prima facie* Case of Title. Lord *Gwydir* affirms by his Affidavit, that the Lands in question are parcel of the Manor; and it is in Evidence that the Tenants of the Manor have for a great length of time enjoyed Rights of Common upon the Lands. This is not only a *prima facie* Title, but it is a Title which is not expressly negatived even by the finding of the Jury. The Jury have found, "That the Land in question was in times past covered with the Water of the Sea, and is now, and has been for several years past, by the Sea left, and not covered with Water, except at high Tides, when the Sea doth flow to the said Sea Wall or Sea Bank; and which Land, from the time of such dereliction, hitherto hath been and still is unoccupied, but the Herbage thereof hath been from time to time eaten and consumed by the Cattle and Sheep belonging to the different Tenants or Occupiers of Land situate within the said Sea Bank or Sea Wall in the said Town, Parish or Lordship of *North Somercotes*." It is not absolutely inconsistent with this finding, that the Land in question might formerly have been within the ordinary high and low-water-mark, and that those under whom Lord *Gwydir* claims might have acquired a Title by Grant from the Crown. It is consistent with this finding, that this Land might have been recovered from the Sea by gradual aluvion, and thus have become part of the Manor; for the Crown has Title only when new Land is recovered by the sudden dereliction of the Sea.

1819.

Ex parte
Lord GWYDIR
and another.

For the reasons which I have already stated, I shall

1819.

Ex parte
Lord GWYDIR
and another.

give no Opinion whether the finding of the Jury amounts to Title in the Crown. Those who advise Lord *Gwydir* in the proceeding by Traverse, which I now declare that he is at liberty to take, if he thinks proper, will determine for him what is the Fact which he has to try at Law.

The *Vice-Chancellor* then added :—

Although I have thus expressed my Opinion upon this Petition, yet, considering the importance of the general principle, which I deduce from the Statutes referred to, and the number and extent of those Statutes, I shall be quite ready to hear a second Argument upon this subject, if it be desired on the part of the Crown.

Solicitor-General:—

I do not think that it is necessary, after what your *Honor* has stated, to trouble you with the Case of the other Petitioner, Mr. *Scrope*.

The VICE-CHANCELLOR :—

The Case of the other Petitioner will afford you the opportunity of reconsidering the effect of those ancient Statutes.

Solicitor-General:—

We are glad that your *Honor* has gone so fully into the subject as to do away that necessity. Mr. *Scrope's* Case, in respect of the circumstance of the Wreck, is, indeed, a stronger Case for him than Lord *Gwydir's*.

Permission to traverse allowed.

1819.

WATHEN v. SMITH.

27th, 30th July,
2d August.

J. WATHEN, by a Covenant in his Marriage Settlement, 31 January 1801, covenanted, "for himself, his Heirs, &c. that in case the intended Marriage should take effect, and *Eliz. Smith* (his intended Wife) should survive him, his Heirs, &c. should, within six calendar months next after his Decease, pay or cause to be paid unto the said *Eliz. Smith*, her Executors, &c. the sum of 1,000*l.* sterling, to and for her and their own use and benefit." The Marriage took place; and *J. Wathen* died 17th January 1808; and by his Will 24th May 1805, after giving a Leasehold Dwelling-house to his Wife, bequeathed as follows: "I also give and bequeath unto my said dear Wife *Eliz. Wathen* the sum of 1,000 *l.* of lawful Money of Great Britain, to be paid to her within three calendar months next after my decease, for her own use and benefit." And the Testator also bequeathed to his Wife all his China, Books, Pictures and Household Goods of every sort and kind whatever, and all his stock of Wines and other Liquors in his Dwelling-house at his death; and also his Carriages, Horses and Harness; and also his Watches, Diamonds, Rings, Trinkets, Wearing Apparel, and all her Paraphernalia. And after giving certain specific pecuniary Legacies, "gave, devised and bequeathed all his freehold Messuages, Farms, Lands, Tenements and Hereditaments whatsoever and wheresoever, and also all the rest and residue and remainder of his leasehold Estates whatsoever and wheresoever, with their Appurtenances, unto

*Covenant by Husband on Marriage to pay to the Wife 1,000*l.* six months after his decease.*

*By his Will he gives her 1,000*l.* payable three months after his decease; and after certain specific Legacies, directs the residue of his real and personal Estate to be sold, and pay thereout all his Debts and Legacies, and to pay the Interest on the residue to his Wife for Life, or until her second Marriage, with a Limitation over on her Death or Marriage.*

The Legacy held to be a Satisfaction of the Covenant.

1819.

WATHEN.

2.

SMITH.

Debts and Legacies should be paid," and this 100*l.* Bond being then a Debt, and the 500*l.* being a Legacy, it was as strong as if he had decreed that both the Bond and Legacy should be paid." In the present Case, there is a direction in the Will to convert the Leasehold and the residue of the personal Estate into a Fund, which is to be applied in payment of Debts and Legacies; without that direction the Legacy would certainly have been construed a satisfaction of the Debt, but containing that direction it falls within the distinction in *Chauncey's Case*. In *Richardson v. Greese (b)*, the decision in *Chauncey's Case* was followed by Lord *Hardwicke*; and in *Field v. Mosten (c)*, the same Rule prevailed. It is too late to consider whether those Decisions be right or wrong, or to speculate on the actual intent. In *Garthshore v. Chalie (d)*, there was a Covenant by the Husband on his Marriage to convey a certain proportion, in particular events, of such real and personal Estate as he should have at his decease, as a provision for his Wife and Family, and the Wife was held to be precluded from claiming under the Covenant, and also a Share, in consequence of the Intestacy of her Husband; but that Case does not apply to the present; it proceeded upon the clear intention of the Parties in the Marriage Contract. In *Haynes v. Mico (e)*, a Bond was given upon Marriage to secure 300*l.* (the Wife's Fortune,) payable to her within *one month* after the death of the Husband. By his Will he gave her 500*l.* payable *six months* after his death, together with other Legacies, and it was held not to be a Satisfaction of the

(b) 3 Atk. 65.

(d) 10 Ves. 1.

(c) 2 Dick. 543.

(e) 1 Bro. C. C. 129.

Bond. That Case was followed in *Devese v. Pontet* (f), and is recognized by Lord Eldon in *Garthshore v. Charlie* (g), and, by the Master of the Rolls, in *Goldsmid v. Goldsmid* (h). In this Case, therefore, according to the Authorities, the Legacy cannot be considered as a Satisfaction of the Covenant; and the Exception to the Master's Report is well founded.

1819.

WATKIN
v.
SMITH.

Mr. Horne, Mr. G. Wilson and Mr. Trollope,
Mr. Treslove and Mr. Abercromby, contra :—

It is a general Rule, that where a Testator is indebted, and he gives a Legacy greater than the Debt, it is a satisfaction of the Debt. The Legacy must be considered in this Case as a satisfaction, or rather, as a performance of the Covenant. It is improperly considered as a Debt; it was not so; the Testator was not a Debtor—he only by the Covenant gave a demand upon his Assets. By his Will he gives precisely the same sum he had covenanted should be paid. There is nothing in the Will to show an Intention either way, except that the Legacy is directed to be paid within three months, and the Money covenanted to be paid was payable only six months after his decease; but that variation was probably intended as an advantage to his Wife. The Charge of the Debts on the real and personal Estate has no effect in this Case, for what was payable upon the Covenant was not a Debt; no Debt could arise until six months after the Testator's Death,

(f) 1 Cox 188; S. C. in *you*; see *Garthshore v. Charlie*,
Mr. Finch's Note to Precedents in Chancery, p. 240. 10 Ves. 9.
That Note is supposed to have (g) 10 Ves. 1.
been corrected by Lord Ken- (h) 1 Swanst. 211; S. C.
1 Wils. C. C. 140.

1819.

WATHEN
v.
SMITH.

when the Money was payable under the Covenant. If there was no Debt, there could be no Intention to pay a Debt; and the Cases cited have no application. "These," says the *Master of the Rolls*, in *Goldsmid v. Goldsmid* (i), "are not Cases of an ordinary Debt; during the Life of the Husband there is no breach of the Covenant, no Debt; the Covenant is, to pay after the Death." *Chauncey's Case*, and *Richardson v. Greese* are distinguishable: the Debt due in those Cases was for Wages; the Legacy in the former Case was given for long and faithful Services; in the latter, with expressions, showing, that Bounty was intended. The Legacies in those Cases, it was very clear, could not be considered as a Satisfaction of the Debt for Wages (h). *Feld v. Mosten*, is a short Note, and the Will is not stated. There the Intention was thought clear that a Satisfaction was not intended. A Share, under an Intestacy, exceeding the Amount of a Sum covenanted to be paid three Months after the Intestate's Death, has been held to be a Satisfaction of the Covenant (l). The Authorities on the Subject are all considered in *Garthshore v. Chalkie* (m). There does not appear any reason why a Legacy should, so far as regards Satisfaction or Performance of a Covenant, operate differently from a Sum taken under an Intestacy, or a quasi Intestacy. In *Haynes v. Mico* (n), and *Devese v. Pentet* (o), the Sum was covenanted to

(g) 1 Swanst. 211; S. C. 1 Wils. C. C. 140.

(k) In *Richardson v. Greese*, Lord Hardwicke said, that Legacies given to Servants had never been adjudged to go in Satisfaction of Debts due to them.

(l) *Goldsmid v. Goldamid*, 1 Swanst. 211; S. C. 1 Wils. C. C. 140.

(m) 10 Ves. 1.

(n) 1 Bro. C. C. 129.

(o) *Precedents in Chancery*, p. 240, in Note to Mr. Finch's Edition.

be paid at an earlier period than the Legacy given was to be paid, and therefore held not to be a Satisfaction, because injurious in that respect; but here the Payment is accelerated, which is an Advantage to the Covenantee.

1819.

WATKIN
v.
SMITH.

The VICE-CHANCELLOR:—

This Case is in some respects new, and I shall reserve my final Opinion until I have looked at the Authorities which have been cited. According to my present Impression, this Legacy is a performance of the Covenant. Undoubtedly these are Cases of intention; but the intention to perform the Covenant is to be presumed, unless there be special circumstances to repel that presumption. In *Chauncey's Case*, it was held, that the direction in the Will, that the Testator's just Debts should be paid, repelled the presumption that a Legacy to the Creditor was intended as a satisfaction of the Debt. I think *Chauncey's Case* does not apply here; and that this Provision for the Wife by the Settlement is not a Debt within the sense in which the Testator must be understood to use the word "Debts" in his Will.

On this Day, the *Vice-Chancellor* said, he continued of the Opinion he had before expressed, that the Legacy was a Satisfaction of the Covenant, and that it could not be considered to be within the intention of the Testator, when he made a Provision by his Will for the payment of Debts. He observed also, that the Decision in *Haynes v. Mico* had been questioned; and referred to Lord *Eldon's* Observations on that Case in *Garthshore v. Chalie*; but that if *Haynes v. Mico* were

and August

1819.

WATKIN
v.
SMITH.

to be considered as an Authority, the Legacy there was made payable at a more distant period than the Provision under the Settlement Bond; whereas here the Legacy was payable at an earlier period.

Exception over-ruled.

Between JAMES KEANE, and THOMAS DOWLING, RICHARD DOWLING, JAMES DOWLING, MARY ANN DOWLING, and CATHARINE DOWLING, Infants, by the said *James Keane* their Grandfather and next Friend, on behalf of themselves and the several other Legatees and Creditors of *Patrick Keane*, Gentleman, deceased, who shall come in and contribute to the Expenses of this Suit - - - - - Plaintiffs;

And,

WILLIAM TIERNEY ROBARTS, JOHN MEADE THOMAS and EDMUND FENNEL, ROBERT HEDGES MANSELL, JOHN TAUNTON and THOMAS KEANE, and JOHN DE LORD, when within, &c. - - - - - Defendants.

19th, 28th, and
29th June.

Bankers, the Agents of Executors, and authorized by them to receive certain Assets, remitting the Amount to

the Executors in the course of their duty as Agents, and afterwards applying the Assets, when received, in payment of the Amount of such Remittances, are not responsible in respect of a misapplication by the Executors; they not being privy to any intention of such misapplication.

THE Bill stated the Will of *Patrick Keane*, deceased, late of *Bruff*, in the County of *Limerick*, bearing date the 1st May 1815, whereby he gave to the Defendants *Thomas and Fennell*, of the City of *Limerick*, Merchants, as Trustees of his Will, the sum of 25,666 l. of lawful

23 Lf NS. C
441. 3.

1819.

KEANE
and others,
v.
ROBERTS
and others.

Money of *Great Britain*, together with all such other Estates and Property as he might die seised or possessed of, in Trust, to invest the same in the Funds, or on Real or Government Securities, as they should think fit, and pay the Interest and Proceeds as follows:—To his Father, the Plaintiff *James Keane*, during his Life, the sum of 500 *l.* sterling a year, payable as therein mentioned; and after his decease, to pay the said sum of 500 *l.* sterling a year unto his Nephews, the Children of his Sister *Honora Dowling*, namely, the Plaintiffs *Thomas Dowling*, *Richard Dowling*, and *James Dowling*, to be equally divided between them, payable, and with such provisions as to Survivorship, as therein mentioned:—To his Sister *Honora Dowling*, for and during her Life, the sum of 200 *l.* sterling a year; and after her death, the same to be paid to her Children before-mentioned, viz. *Richard* and *Thomas Dowling*, to be equally divided between them, in like manner as the 500 *l.* before given after his Father's death:—To his two Step-sisters *Anne Keane* and *Catharine Keane*, the sum of 1,500 *l.* each, to be paid on their Marriage with the consent of his Trustees, and until their Marriage to be paid each of them the Interest of the 1,500 *l.*; and the Principal, after the death of each unmarried, to his Nephews, two of the Plaintiffs, the Sons of his Sister *Honora Dowling*:—To his Step-brother *Matthew Keane*, the sum of 3,000 *l.* sterling, to be paid to him by his Trustees and Executors immediately after his decease:—To *James Keane*, the sum of 4,000 *l.*; and to his Step-brother *Thomas Keane*, the sum of 3,000 *l.* sterling, to be paid to them also immediately after his decease:—The sum of 1,500 *l.* sterling to be paid and applied by his Trustees and Executors immediately after his decease for the following purposes; that is to say, to

1819.

KEANE
and others,
v.
ROBERTS
and others.

John Keane, of, &c. the sum of 500*l.* sterling; the sum of 500*l.* sterling to add for such Charitable Uses and Purposes as they might think proper; and as to the Résidue of his Estate and Property, he devised and bequeathed the same unto his Nephew, the Plaintiff *Richard Dowling*, eldest Son of his Sister *Honora Dowling*, as his sole Residuary Legatee and appointed the Defendants, *Thomas* and *Fennell*, Executors of his Will.

The Bill further stated, that the Testator died on the 8th September 1815; and that the Defendants *Thomas* and *Fennell* proved his Will in the Court of the Archbishop of *Dublin*, and also in the Prerogative Court of the Archbishop of *Canterbury*:—That a Commission of Bankruptcy, bearing date 3d January 1817, issued against *Thomas* and *Fennell*, under which they were found Bankrupts, and the Defendants *Mansell*, *Tenison* and *Keane* were chosen Assignees:—That the Defendants *Thomas* and *Fennell* employed the other Defendants *Roberts* and *De Lord*, Merchants and Partners, as their Agents to collect in and receive the Assets of the Testator, which were in *Great Britain*, *France*, and *Portugal*; and that by virtue of a Power of Attorney they possessed themselves of Assets to a considerable Amount:—That before and at the time when the Defendants *Thomas* and *Fennell* employed the Defendants *Roberts* and *De Lord*, their Agents, to collect the Testator's Assets, there was an Account subsisting between them; and that they opened another and a separate Account with *Thomas* and *Fennell* as Executors of the Testator, in which they at first gave Credit to the Executors for the Assets of the Testator possessed by them; but that in the beginning of the year 1816, *Thomas* and *Fennell* became very embarrassed in their circumstances, and

were in fact insolvent, and being considerably indebted to *Robarts* and *De Lord* on their private or personal Account, and unable to pay what they owed, and *Robarts* and *De Lord* being acquainted with their Embarrassments and Insolvency, they determined to apply the whole of the Assets of the Testator which they were possessed of by virtue of the Powers of Attorney given to them by the Executors, to the liquidation of the Balance due to them from *Thomas* and *Fennell*; and accordingly, in the beginning of the year 1816, sold out several large Sums which had been invested by the Testator in Government Securities, and instead of placing the Monies to the Credit of *Thomas* and *Fennell*, in the Account which they had opened with them as such Executors, they carried the same to their Credit in their private or personal Account, and they about the same time closed the Executorship Account; and there being a considerable Balance due to the Executors upon the Executorship Account, they carried the Balance to the Credit of *Thomas* and *Fennell* in their private or personal Account:—That when *Robarts* and *De Lord* sold out the Government Securities standing in the Name of the Testator, and when they carried the Monies produced thereby, and also the Balance due on the Executorship Account, to the Credit of *Thomas* and *Fennell* in their private or personal Account, they had Notice of the Testator's Will, and of the Trusts thereof, and that it was a wilful Fraud upon the Plaintiffs and others interested in the Assets in so applying the same, and that they ought to be accountable to the Plaintiffs and other Persons interested in the Assets for every part thereof so possessed by them, and applied in the liquidation of their private or personal Demands upon the Executors. The Bill then charged, that *Thomas* and

1819.

KEANE
and others,
vs.
ROBARTS
and others.

1819.

KEANE
and others,
v.
ROBARTS
and others.

Fennell, at the time of their Bankruptcy, possessed Assets of the Testator, *in Specie*, to a considerable Amount, and that the same still remains in their possession, or have been possessed by their Assignees:—That *Robarts* and *De Lord* never remitted the Assets to the Executors; and that when the Government Securities were sold out, *Thomas* and *Fennell* were indebted to *Robarts* and *De Lord*, on their personal or private Account, in a Balance of 25,000*l.* and upwards; and that they repeatedly applied for payment of the same, but without effect; and that various Letters passed between them with respect thereto; and that *Robarts* and *De Lord* considerably reduced such Balance, by placing the Monies produced by the Sales of the Sums sold out by them to the Credit of their private or personal Account; and that they still further reduced such Account, by carrying the Balance due to the Executors upon the Account opened with them in respect of the Assets, to their Credit in their private and separate Account; and that by such means the Balance due to *Robarts* and *De Lord*, by *Thomas* and *Fennell*, at the time of their Bankruptcy, was considerably less than it would otherwise have been; and that so it would appear by several Accounts furnished by *Robarts* and *De Lord* to *Thomas* and *Fennell* before they became Bankrupts, and by an Account by them furnished to the Assignees since the Bankruptcy, whereof *Robarts* and *De Lord* have Copies or Duplicates in their possession, entered in their Books of Account:—That *Robarts* and *De Lord*, when they so possessed and applied such Assets, had full Notice of the Trusts of the Will, and that they obtained Probate of the Will in *England*, and paid for the same for the Executors, and have still the Probate in their possession or power, and

1819.

KEANE
and others,
v.
ROBARTS
and others.

that the same was recited in the Power of Attorney under which they sold out the Sums invested in Government Securities, standing in the name of the Testator in the Books of the Bank :—That if directions were given by the Executors to place the Assets to the Credit of their personal and private Account, the same were fraudulent as against the Plaintiffs and the several other Persons interested in the Assets, whose Interest was known to *Robarts* and *De Lord*; and that it was against Equity in them to obey such directions :—That *De Lord* is out of the Jurisdiction of the Court; and that the Defendants have in their possession divers Deeds, Books, &c. relating to the Matters in question, which, if produced, the truth of the Matters would appear, but which they refuse to produce.

The *Prayer* of the Bill was, That a Receiver might be appointed of the Personal Estate of said Testator *Patrick Keane*; and that an Account might be taken, by or under the direction of this Court, of the Personal Estate and Effects of the said Testator *Patrick Keane*, and of every part thereof possessed by said Defendants, or any or either of them, or by any Person by their or either of their order, or for their or either of their use, and of their application thereof, and of the Debts, Funeral and Testamentary Expenses and Legacies of the said Testator; and that the Defendants *Robarts* and *De Lord* might be compelled to replace all such Sums, parts of the said Assets, as were by them improperly sold out of the said Government Securities of *Great Britain* aforesaid; and that they might also be compelled to pay the Amount of all Interest or Dividends which would have accrued due thereon, if the same had not been so improperly sold out as aforesaid; and that

1819.

KEANE
and others,
v.
ROBERTS
and others.

they might be compelled to pay what might afterwards appear to remain due by them in respect of the said Assets; and that the Defendants *Thomas* and *Fennell* might be compelled to yield up such part of the said Assets as may have remained in Specie in their hands at the time of their said Bankruptcy; or in case it should appear that their said Assignees had possessed any parts or part thereof, that they might account for and yield up the same; and if the said Bankrupts have committed any *Devastavit*, or are indebted in respect of the said Assets, then that the Amount of such *Devastavit* or Debt might be proved under the said Commission; and that the Assets of the said Testator might be administered under the Directions of this Court; and that all proper Directions might be given for effecting the purpose aforesaid; and that the Plaintiffs, and the several other Legatees and Creditors of the said Testator, might be paid their several Debts and Legacies in a due course of Administration; and that the clear Residue of the Personal Estate of the Testator might be ascertained and secured for the benefit of the Plaintiff *Richard Dowling*.

The Answer of *Roberts* admitted the Will of *Patrick Keane* the Testator, and his death; and that the Will was proved; and that *Thomas* and *Fennell* became Bankrupts, as stated in the Will: but denied that *Thomas* and *Fennell* employed him and *De Lord* as their Agents to collect and receive the Assets, or that they executed any Power of Attorney to them for that purpose; but that *Thomas* and *Fennell* executed to the Correspondent in *Paris*, and to *De Lord*, a Power of Attorney, enabling them to receive such Sums as were due to *Thomas* and *Fennell* as such Executors; and, in consequence, such

Correspondent and *De Lord* received two Sums of Money on account of the Testator's Estate, one, the Proceeds of certain *French* Stock, and the other the amount of the Proceeds of a Debt due to the Testator ; —and that *De Lord* opened a Memorandum in their Book of Account, called the Account Current Book, for the purpose of entering the receipts of the Proceeds of such two Sums as the same came into receipt from their Correspondent, and of debiting such Account with such Sums as might become debitable thereto before the net Proceeds could be ascertained ; and in order to ascertain and define the net Proceeds of such Remittances, and for the purpose of carrying such net Proceeds, when defined and ascertained, to the Credit of *Thomas* and *Fennell* in their general Account, and in which the whole of the Account and Transactions existing between the Defendant and *De Lord*, and *Thomas* and *Fennell*, had been entered ; and which net Proceeds, when so defined and ascertained, and amounting to the sum of 5,468*l.* 10*s.* were, on the 30th April 1816, carried to the Credit of the said Account : —That the Letter of Attorney is retained by the Government of *France*, and that Defendant has no Copy of it in his possession or power : —That Defendant and *De Lord* received, on the 8th February 1816, 1,132*l.* 19*s.* 4*d.* of *I. B. & Sons*, of *London*, Merchants, the Agents of *I. B. & Son* at *Lisbon*, who were Debtors in that Sum to the Testator ; and which being received in one entire Sum, was carried to the Credit of *Thomas* and *Fennell* in their said general Account on same 8th February : —That *Thomas* and *Fennell* executed to the Defendant and *De Lord* a Power of Attorney, enabling them to sell out 18,700*l.* 3 per cent. Consols, standing in the name of the Tes-

1819.

KEANE
and others,
v.
ROBARTS
and others.

1819.

KEANE
and others,
v.

ROBERTS
and others.

tator in the Bank ; which Power of Attorney was retained by the Bank on the transfer of the Stock :—That the Proceeds of such Stock being received in one entire Sum, were, on the 6th February 1816, the day the same was sold, carried to the Credit of *Thomas* and *Fennell* in their general Account Current :—That before the Powers of Attorney were executed, there was an Account depending between the Defendant and *De Lord* with *Thomas* and *Fennell* ; but denies that they opened any separate Account with *Thomas* and *Fennell*, as Executors of the Testator, save the Memorandum before mentioned, or that they gave Credit to the Executors for the Assets of the Testator :—That, in the Schedule, he has set forth an Account of all the Sums received by him and credited, and that they were from time to time drawn out of the hands of the Defendant and *De Lord* by *Thomas* and *Fennell*, as stated in the Accounts set forth :—That the Accounts were sent quarterly, and were received and acknowledged ; and that *Thomas* and *Fennell*, in order to pay the Balance of 7,015 *l.* 18 *s.* which appears due on the third quarterly Account, remitted to Defendant and *De Lord* seven Bills of Exchange for 1,000 *l.* each, dated *Limerick*, 1st August 1816 ; three of which Bills were paid ; but four, coming due after the Bankruptcy of *Thomas* and *Fennell*, were not paid, which left a Balance of 3,348 *l.* 17 *s.* due to the Defendant and *De Lord*, which has been proved under the Commission :—Denies it to be true, to his knowledge and belief, that, at the beginning of the year 1816, *Thomas* and *Fennell* became embarrassed in their circumstances, or that they were in fact insolvent, although they might then be under difficulty in realizing their Property in time to meet their engagements ; but admits that they were indebted to him and

De Lord at that time in the Balance of their Account as set forth:—Denies that he or *De Lord* determined to apply the whole, or any part, of the Assets of the Testator which they could obtain under the Powers of Attorney, to the liquidation of the Debt due to them from the Executors on their private or personal Account, the Proceeds of the *English* Stock having been drawn for by the Executors out of their hands, as before stated:—That the sum of 11,214*l.* 5*s.* 7*d.* was the Amount of the Money received by the Sale of 18,700*l.* 7*s.* three per cents. standing in the Testator's Name in the Books of the Bank; and the Stock was sold by the order of Defendant and *De Lord*, in pursuance of orders from *Thomas* and *Fennell*; and that Defendant and *De Lord* carried the same to the Credit of *Thomas* and *Fennell* in their general Account, which had been previously opened:—That on the 31st December 1816, the general Account between the Defendant and *De Lord* with *Thomas* and *Fennell* was closed, and the Balance due to Defendant and *De Lord* was 3,348*l.* 17*s.* which Sum has been proved:—Denies that, at the time of the Sale of the Stock, he or *De Lord* had Notice of the Will, or the Trusts thereof, save as may appear from the circumstances before mentioned, and in the Schedule annexed; and denies that any wilful Fraud was practised; and insists, that under the circumstances, he and *De Lord* are not accountable for the Monies received by them:—That not having received or paid any other part of the Testator's Estate, save as before mentioned, or in any other manner intermeddled therewith, he is unable to set forth an Account thereof, or of the Debts of the Testator; and hath set forth in a Schedule the Books, &c. in his possession or power, or as he knows and believes, of

1819.

KEANE
and others,
v.

ROBARTS
and others.

1819.

KEANE
and others,
v.
ROBERTS
and others.

De Lord:—That there never were any Accounts between him and *De Lord* with *Thomas* and *Fennell*, save the Accounts before mentioned; and that the last-mentioned Account, and the Balance due thereon, did not in any manner arise, and had no connection with, the Matters inquired of by the Bill, but related solely to the general concerns between the Defendant and *De Lord* with *Thomas* and *Fennell*:—Denies that he or *De Lord* considerably, or in any degree, reduced the said Balance by applying the Assets to the liquidation thereof, or in any manner, save as before mentioned:—Denies that he or *De Lord*, when, as in the Bill alleged, they had misapplied the Assets, had full or any Notice of the Trusts of the Will, save that he admits that he and *De Lord* did, on the 9th October 1816, receive from the Proctors of *Thomas* and *Fennell* a Probate of the Will, the contents of which Defendant is wholly unacquainted with, never having read, or even seen, the same; and that, by the direction of *Thomas* and *Fennell*, the Defendant and *De Lord* paid the Expenses of obtaining such Probate, and charged the same to the Account of *Thomas* and *Fennell*; and that the Probate was left in the possession of the Defendant and *De Lord*:—Said, that *Thomas* and *Fennell* gave Defendant and *De Lord* directions to apply the Sums received by them, under the Powers of Attorney and otherwise, to the liquidation of their Demands upon *Thomas* and *Fennell*; and that the particulars of such Directions, and when they received the same, appear from divers of the Letters mentioned and referred to in the third Schedule:—Denies that he knew or believed, and does not admit that *De Lord* knew that such Directions were fraudulent as against Plaintiffs and the several other Persons interested in the Assets:—Believes that *De Lord* is at

Geneva in Switzerland, or at some other Place out of the Jurisdiction of the Court.

1819.

KEANE
and others,
v.
ROBERTS
and others.

The Defendants *Thomas and Fennell*, by their joint and several Answer, admitted the Will of *Keane*, and his death; and that they proved the Will in *England and Ireland*, and possessed themselves of considerable part of his personal Estate and Effects; and that a Commission was issued, and Assignees chosen, as stated in the Bill. Their Answer further stated, that various mercantile dealings having subsisted several years between the Defendants and *Roberts and De Lord*, Merchants, they executed and forwarded to them Powers of Attorney, which they were advised were necessary, to enable *Roberts and De Lord*, and their Correspondents in *France and Portugal*, to call in and collect the Assets of *Keane*; but who the particular Persons were who, besides *Roberts and De Lord*, were named in said Powers of Attorney, or in whose possession the same are, they cannot from recollection or belief set forth:—Believe that *Roberts and De Lord* did, by virtue of the Powers of Attorney, possess themselves of the Assets of the Testator to a considerable Amount, and gave Credit to Defendants for the same:—Admit, that long before, and at the time of, the execution of the said Powers of Attorney, there was a Mercantile Account subsisting between *Roberts and De Lord* and Defendants; but whether *Roberts and De Lord* did, after the execution of the same, or at all, open and keep another and a separate Account with the Defendants as Executors of *Keane*, they cannot from their knowledge and belief set forth; but that if *Roberts and De Lord* opened and kept any such separate Account, the same was opened and kept by them without the knowledge

1819.

KEANE
and others,
v.
ROBARTS
and others;

of Defendants:—Say it is not true that the Defendants, in the beginning of the year 1816, became very embarrassed in their circumstances, or were at all insolvent, or under such difficulties as in the Bill alleged; but admit, that a Balance of 7,015*l.* 18*s.* or thereabouts, appeared to be due by Defendants to *Robarts* and *De Lord*, on or about the 1st August 1816, on foot of one-third of their quarterly Accounts; the Defendants *Robarts* and *De Lord* having usually furnished the Defendants with quarterly Accounts on the foot of all dealings and transactions depending between them; and Defendants admit that they did, in order to liquidate the said Account, remit to *Robarts* and *De Lord* seven Bills of Exchange, drawn by Defendants upon, and accepted by, *Richard Meade*, in Bill named, for 1,000*l.* each, payable at several dates; the three first of which became due in or about the months of January, February, March, and April, 1817, and were not paid, whereby a Balance of 3,348*l.* 17*s.* or thereabouts, was left due by Defendants to *Robarts* and *De Lord*, which Balance they proved under the Commission issued against the Defendants:—That *Robarts* and *De Lord* usually furnished these Defendants with quarterly Accounts of all dealings and transactions subsisting between them; and that these Defendants, at as early a period as possible after receiving such Accounts, placed such Sums as appeared thereby to have been received by *Robarts* and *De Lord* for these Defendants, as such Executors as aforesaid, to the Credit of the Estate of the said Testator; and that in such quarterly Accounts the sum of 5,468*l.* 10*s.* being the Produce of the Assets of the Testator in *Portugal*, and which Sums were received by *Robarts* and *De Lord* from their Correspondents abroad, were credited to these Defendants

by *Robarts* and *De Lord* in their general Account; and that these Defendants carried the same to the Credit of the Estate of the Testator:—Admit that they executed to *Robarts* and *De Lord* a Power of Attorney, to enable them to sell out and transfer the sum of 18,700*l.* 3 per cent. Consols, which stood in the Name of the Testator in the Books of the Governor and Company of the Bank of *England*; and that the Proceeds of such Stock were received by *Robarts* and *De Lord*, and placed to the Credit of these Defendants in their general Account Current; and that the said Sum was credited by *Robarts* and *De Lord* to these Defendants; and that these Defendants carried the same to the Credit of the Estate of the Testator:—Say they believe that the whole of the Sums of Money so received by *Robarts* and *De Lord* were by them credited to these Defendants, and that these Defendants carried the same to the Credit of the Estate of the Testator:—Believe that the whole of the Sums so received by *Robarts* and *De Lord* were by them credited to these Defendants as aforesaid; and that all other Sums of Money received by them on account of these Defendants, as such Executors as aforesaid, were accounted for by them the said *Robarts* and *De Lord*:—Admit that the Plaintiffs applied to these Defendants to come to an Account with them, in respect of the Assets of the Testator; and Defendants furnished them a just and fair Account of all such part of the Assets of the Testator as came to their hands, or to the hands of any Person for them, stating how the same had been applied or disposed of, to which Account they refer; and that they cannot now set forth a more particular or accurate Account.

1819.

KEANE
and others,
v.
ROBARTS
and others.

1819.

KEANE
and others.
v.
ROBARTS
and others.

The Plaintiffs and the Defendants went into Evidence, particularly with respect to Letters between *Robarts* and *De Lord* and *Thomas* and *Fennell*. It is not material to state this Evidence, which was voluminous, as the result of it, as it appeared to the Counsel and to the Court, will appear in the Arguments, and in the Judgment.

Mr. *Bell*, Mr. *Horne*, and Mr. *Blake*, for the Plaintiffs:—

The Question is, Whether the Defendants *Robarts* and *De Lord* did not receive the Assets of the Testator *Keane* under such circumstances, that they cannot retain them? We say, that there was a Fraud concerted between *Robarts* and *De Lord*, and *Thomas* and *Fennell*, for the application of *Keane's* Assets, to discharge the Debt due from *Thomas* and *Fennell* to *Robarts* and *De Lord*. The Testator died on the 8th September 1815, being assassinated at *Paris*. The Balance due to *Robarts* and *De Lord* at *Keane's* death amounted to 8,000 *l.* it afterwards increased to 25,000 *l.* Soon after the Testator's death, *Robarts* and *De Lord* contemplate the application of the Testator's funded Property in discharge of their Debt, due from *Thomas* and *Fennell*; and a few Weeks after his death they obtain authority to sell out 18,700 *l.* 3 per cent. Consols, and also Monies in the *French* and *Portuguese* Funds; and in a Letter of the 19th December 1815, about three months after the Testator's death, they express their disappointment in having been delayed in receiving the Testator's Assets. Throughout the Correspondence, *Thomas* and *Fennell* treat the Assets of *Keane* as their own; but *Robarts* and *De Lord* knew that they, for their own private purposes, were making use of the Assets of *Keane*. The Letters in October 1815, show, that the purposes of the

1819.

KEANE
and others,
- v.
ROBARTS
and others.

Will did not require an immediate Sale, nor is there any Evidence that Advances were in fact made to the Legatees : they could not suppose that the Executors, at a period of commercial distress, would embarrass themselves by payments to the Legatees before the Assets were received. *Robarts*, in his Answer, does not pretend that the Advances were for the payment of Debts or Legacies ; they were aware of the contents of *Keane's* Will, and of the Trust imposed on *Thomas* and *Fennell* as his Executors ; for the Will was in their hands to obtain Probate, which they procured ; and their attention was particularly drawn to the Will, from the difficulties interposed to obtaining the Assets in *France*. The Correspondence also shows they knew the Trusts of the Will, and that the first Trust was to invest 25,000 *l.* for the purposes of the Will, before any other of the Legacies were to be paid. The Language used by *Robarts* and *De Lord*, before they obtained the Powers of Attorney, and had received the amount of Testator's Stock in the Bank of *England*, was very different from what it was afterwards ; they then use threats ; and the instant they get Powers to receive the last remnant of the Testator's Assets, they refuse to accept any more Bills for *Thomas* and *Fennell*. It does not appear that *Robarts* and *De Lord* kept any separate Account of the Executorship Transactions, except as to Money in the *French* Funds. In most of the Cases there was a Pledge of the Assets in respect of Advances, but in this Case there was no such Pledge. The Cases on this subject are collected in *M^r Leod v. Drummond* (a). The first Case is *Humble v. Bill* (b) ; then follow *Paget v. Hoskins* (c), *Mead v. Lord Orrery* (d), *Bonny v. Rid-*

(a) 17 Ves. 172.

(b) 2 Vern. 440.

(c) Prec. in Chanc. p. 431.

(d) 3 Atk. 237.

1819.

KEANE
and others,
v.
ROBERTS
and others.

gard (e). In that Case Sir *Thomas Sewell's* Decree was reversed by the *Lord Chancellor*, on the ground of length of time; and, but for that circumstance, the *Lord Chancellor* said he should have decreed as Sir *Thomas Sewell* had done. Afterwards came *Andrew v. Wrigley* (f). The Opinion expressed by Lord *Mansfield* in *Waley v. Booth*, mentioned in Note to *Farr v. Newman* (g), was considered by Lord *Eldon* in *M^r Leod v. Drummond* (h). The leading Cases on which the Law now stands, are *Scott v. Tyler* (i); *Hill v. Simpson* (k), and *M^r Leod v. Drummond*. From these Cases the conclusion is, that *Roberts* and *De Lord*, being aware of the Trusts of the Will, and remitting this Money to *Thomas* and *Fennell*, who they knew were in embarrassed circumstances, and were applying the same, not for the purposes of the Will, but for their own commercial purposes, they, *Roberts* and *De Lord*, must be held responsible for their Collusion with these Executors in the misapplication of the Assets.

Mr. Hart, Mr. Wetherell, and Mr. Raithby, for the Defendants:—

There is no ground whatever for the imputation of Fraud by *Roberts* and *De Lord*, contained in the Bill, and insisted on by the Counsel of the Plaintiffs. They acted merely as Agents to the Executors, whose conduct they had no authority to superintend or controul. The Evidence fastens no Fraud on them in respect to the Testator's Assets. The Testator's Relations lived in *Ireland*, and were anxious to receive their Legacies. It was the intention of the Testator that his Assets

(e) 1 Cox, 145; and mentioned 4 Bro. C. C. 138.

(f) 4 Bro. C. C. 125.

(g) 4 Term. Rep. 625.

(h) 17 Ves. 172.

(i) 2 Dick. 712.

(k) 7 Ves. 152.

should be laid out on Real Securities in *Ireland*; and it was an object to obtain the Assets as soon as possible, to invest in the *Irish Funds*, until Real Securities could be found. *Thomas* and *Fennell* had undoubtedly large mercantile concerns with *Robarts* and *De Lord*, and having a high opinion of their integrity, they employed them to receive the Testator's Assets. It is clear, from the Letters, that *Thomas* and *Fennell*'s object appeared to be to draw, through the Agency of *Robarts* and *De Lord*, the Money into their hands at *Limerick*. They regret, in one Letter, that they put *Robarts* and *De Lord* to so much trouble, but they would hardly think it a trouble if the dealing with the Assets was for their advantage. All the dealing with *Robarts* and *De Lord* was merely for a remittance of the Assets; and, of course, the Drafts of *Thomas* and *Fennell* would increase, when *Robarts* and *De Lord* were invested with the character of Agents, to receive the Testator's Assets. The Debt of *Thomas* and *Fennell* at *Keane*'s death was about 8,000*l.*; subsequent Advances increased the Balance to 25,000*l.* but those subsequent Advances were made in the prospect of receiving Assets of the Testator sufficient to replace such Advances. The Executors might be in want of such Advances for the purposes of the Will. There is no Evidence that *Robarts* and *De Lord* knew that *Thomas* and *Fennell* were in embarrassed circumstances; it is denied in the Answer; nor was it known that they were misapplying the Money; nor were *Robarts* and *De Lord* bound to see to the application. The Executors represent, in a Letter dated 30th December 1815, whether truly or falsely does not appear, that they had made heavy Advances to the Legatees. When the Accounts were closed, *Thomas* and *Fennell* were indebted to *Robarts* and *De Lord* in something more than

1819.

KEANE,
and others,
v.
ROBARTS
and others.

1819.

KEANE
and others,
v.
ROBARTS
and others.

what they owed at the death of *Keane*, so that no part of the Assets was applied in payment of that Debt. The doctrine of Lord *Eldon* in *M'Leod v. Drummond* establishes the Law on this subject; but the doctrine in that Case does not affect *Robarts* and *De Lord*, acting as they did, only as Agents, for the receipt and transmission of these Assets, and there being no Evidence fixing them with a knowledge of any intended misapplication, at the time they were transmitted.

Mr. *Bell*, in reply :—

The Question in this Case is, whether the Defendants *Roberts* and *De Lord* were dealing *bonâ fide* for the purpose of remitting the Assets to the Executors, or whether they were using the Assets as a Pledge in respect of previous Advances? It is not pretended that the Testator owed any Debts; and as to the Payment of the Legacies, they would not have incurred any responsibility if they had waited the usual time allowed by Law for their Payment. The Will directs the Executors to invest the Assets in Real or Government Securities. It was not necessary to sell out the Stock in the *English* Funds for that purpose, it being already invested in Government Security, though it might be proper as to so much of the Assets as consisted of Money in the *French* or *Portugal* Funds. At the death of *Keane*, *Thomas* and *Fennell* were indebted to *Robarts* and *De Lord* in nearly 8,000*l.* which was more than their usual Balance; after his death they were in advance 25,000*l.* Could these Advances have been solicited or made merely for the convenience of the Legatees, at a period of great commercial distress? *Robarts* and *De Lord* making such Advances upon Acceptances, which, as *Robarts* says in one of his Letters, was "covering themselves with disgrace."

They knew that these Advances were for the purpose of assisting *Thomas* and *Fennell* in their commercial distresses, which afterwards ended in Bankruptcy, and that such application of the Assets was intended by them. In no part of the Correspondence is there an intimation that the Money remitted was to be applied to the Legatees. In *Scott v. Tyler*, the Executors pledged the Assets for present and future Advances; but Lord *Thurlow* would not allow the Bankers to make a claim on the Assets; he thought it was not a fair mode of dealing with the Testator's Assets. Could *Robarts* and *De Lord* think it fit that the Money should be sold out of the *English* Funds, where it was secure, and place it in the hands of Merchants in *Limerick*, at a time of great commercial distress? All the circumstances show, that they made Advances to assist *Thomas* and *Fennell* in their commercial distress, without any regard to the Legatees under the Will, and appropriated the Testator's Assets to repay themselves such Advances, which, according to the Decisions, is a Fraud, in respect of which this Court will relieve.

1819.

 KEANE
 and others,
 v.
 ROBARTS
 and others.

THE VICE-CHANCELLOR:—

In this Case the Bill was filed by the Plaintiffs, on behalf of themselves and all other the Legatees and Creditors of *Patrick Keane* deceased, against *John Meade Thomas*, and *Edmund Fennell*, the Executors of *Patrick Keane*, and against their Assignees, they having become Bankrupts, and against *William T. Robarts* and *John De Lord*; and the Bill prays, as against the Executors and their Assignees, the Accounts of the Testator's Estate, and the delivery in Specie of the remaining Assets, and Proof under the Commission for the Debt due to the Testator's Estate from the Executors: and

29th June.

1819,

KEANE
and others,
v.
ROBARTS
and others.

as against *Robarts* and *De Lord*, the Bill prays that they might replace all Sums of Stock, part of the Testator's Estate in the Government Securities of *Great Britain*, improperly sold out by them, and might account for the Dividends which would have been produced if no such Sale had been made, and might account for the Assets otherwise received by them.

The Case made by the Bill is, that *Patrick Keane* died on the 8th of September 1815, being assassinated in Paris, having made his Will and appointed *Thomas* and *Fennell* his Executors; that they were Merchants and Copartners residing at *Limerick*, and before and at the time of the death of the Testator kept an Account with *Robarts* and *De Lord*, as their Agents and Correspondents in *England*; and that upon the death of the Testator, *Thomas* and *Fennell* opened another and separate Account with *Robarts* and *De Lord* as Executors of *Keane*; and that in the beginning of the year 1816, *Thomas* and *Fennell* becoming embarrassed in their circumstances, and greatly indebted to *Robarts* and *De Lord* on their private Account, the latter determined to apply the whole of the Testator's Assets, which they had received or should receive by virtue of Powers of Attorney given to them by *Thomas* and *Fennell*, in satisfaction of their private Debt; and they did accordingly, in the beginning of 1816, sell out the Stock of the Testator in the Government Securities of *Great Britain*, and instead of carrying the Produce to the Executorship Account, they in fact carried it to their private Account, and they then also closed the Executorship Account, and carried a considerable Balance to the Credit of their private Account: and that at the time of these transactions, *Robarts* and *De Lord* had full Notice of the

Testator's Will, and especially knew that the first purpose of his Will was to invest a Sum of 25,666*l.* in Trust, in the purchase of Parliamentary Stock or Public Funds, or on Real or Government Securities; and the Bill insist, that *Robarts* and *De Lord* ought to be held accountable to the Plaintiffs, and all other Persons interested under the Will, for every part of the Assets so applied by them in liquidation of their private Debt.

1819.
—
KEANE
and others,
v.
ROBARTS
and others.

If the Case so made by the Bill had been established in Proof, the Claim by the Plaintiffs against *Robarts* and *De Lord* would have been irresistible; Messrs. *Robarts* and *De Lord* would have been plainly Parties to a gross Breach of Trust by the Executors.

It appears from the Correspondence, which is the principal Evidence in the Cause, that within a few Weeks after the death of Mr. *Keane*, the Executors gave the necessary instructions and authorities to *Robarts* and *De Lord* to sell out a Sum of 18,700*l.* Three per Cent. Stock in the *British* Funds, standing in the Name of the Testator, and also a considerable Sum, which was his Property, in the *French* Funds, and to place the same to their Credit in their general Account; and in like manner to call in and place to their Credit some outstanding Property of the Testator in *Portugal*.

It appears further, that *Thomas* and *Fennell*, and *Robarts* and *De Lord*, were in the habit of stating their Accounts Quarterly; and that on the 1st October 1815, being the Quarterly Account immediately after the death of *Keane*, the Balance due to *Robarts* and *De Lord* was 7,990*l.* 12*s.* and that this Sum had been about the average Balance of their Account.

1819.

KEANE
and others,
v.
ROBARTS
and others.

It appears further, that *Thomas and Fennell*, presuming upon the Sums which they expected would be received by *Robarts and De Lord* under the authorities given to them, drew Bills upon them to a large amount; and that unexpected difficulties arising in the receipt of the Testator's Assets, Messrs. *Robarts and De Lord* had in fact possessed no part of those Assets on the next Quarterly Statement of Accounts, being the 1st January 1816, so that there was then due to them a Balance of 25,543 *l.* 2 *s.*

It appears further, that between the 1st January 1816, and the next Quarterly Statement of Accounts on the 1st April 1816, *Robarts and De Lord* had received from the Produce of the *English Funds*, and from the Testator's Property in *Portugal*, 12,347 *l.* 4 *s.* 11 *d.*; but that on that 1st April 1816, there remained due to them a Balance of 15,182 *l.* 4 *s.* Before the next Quarterly Settlement on the 1st July, namely on the 20th April, Messrs. *Robarts and De Lord* received the Sum of 5,468 *l.*, being the Produce of the *French Funds*; and it will be found by the Account that, on that day, after the application of the 5,468 *l.* the Balance due to them was 8,050 *l.* 8 *s.* 5 *d.* being a few Pounds more than the Balance due to them at the commencement of the dealing with the Testator's Assets. After the 20th April, they possessed no further part of the Testator's Assets.

This transaction, therefore, upon the face of it has simply the character of Monies received by *Robarts and De Lord* on the Account of *Thomas and Fennell*, and remitted to them in *Ireland* by the Payment of Bills drawn from thence. The Assets of the Testator were

not applied in payment of a private Debt due to *Robarts* and *De Lord*; that private Debt was not diminished by those Assets, but a little increased during the transaction.

1819.

KEANE
and others,

v.

ROBARTS
and others.

It is said, however, that *Robarts* and *De Lord* knew that *Thomas* and *Fennell* drew the Bills upon them, by which they received the Testator's Assets, not for the purposes of the Testator's Will, but in payment of their private Engagements, and that they were therefore Parties to the Breach of Trust of the Executors. I think there is no Evidence to that effect.

In their Letter of the 30th December 1815, *Thomas* and *Fennell* expressly state, that presuming no difficulties would occur to delay the receipt of those Monies, they had drawn largely for the purpose of making heavy Advances to the Legatees.

It is true, that in a Letter of the 10th February 1816, Messrs. *Robarts* and *De Lord* complain of *Thomas* and *Fennell* paying former Bills by new Acceptances; but this might be a necessary consequence of the heavy Balance due from them to *Robarts & Co.* and not then provided for by the receipt of the Testator's Assets. In their Letters of the 3d and 12th February, *Thomas* and *Fennell* apologize for the Balance due from them, by speaking of the heavy Advances they had made to Merchants, but this affords no conclusion that they had advanced the Testator's Assets to Merchants; the Advances to Merchants might well account for their not being able to relieve *Robarts* and *De Lord* out of their private Funds, for the heavy Balance due to them on account of Bills drawn upon the Testator's Assets.

1819.

KEANE
and others,
v.

ROBARTS
and others.

I am not, therefore, authorized to say that *Robarts* and *De Lord* knew that the Bills drawn by *Thomas* and *Fennell*, upon the Credit of the Testator's Assets, were not applied by them to the purposes of their Trusts. +

If *Robarts* and *De Lord* had reason to believe that *Thomas* and *Fennell* were so misapplying the Assets, it would be difficult to find a ground which would make them responsible for paying to their Principals the Monies which had been placed in their hands for the purpose of being remitted to them: that would be to make every Trustee accountable for his conduct in the Trust to every Agent whom he happened to employ, and would carry the principle of Constructive Trust to an inconvenient, and, indeed, to an impracticable length.

It is said further, that *Robarts* and *De Lord* had Notice of the Will of the Testator, and knew that the first Trust of that Will was the investment of a Sum of 25,666 *l.* in Parliamentary Funds, or in Real or Government Securities; and that *Robarts* and *De Lord* therefore knew that the Sale of the Three per cent. Stock, and remitting the Produce to *Ireland*, was a Breach of Trust to which they made themselves Parties.

Every Person who deals with an Executor, knowing his character of Executor, has, necessarily, implied, if he has not express, Notice of the Will: but all Dispositions made by a Will of Personal Property, are by Law subject to a prior Charge for the Payment of Debts; and as a Purchaser of Real Estate devised in aid for the Payment of Debts, is not bound to inquire into the fact, whether the Sale is made necessary by the existence of Debts, because he has no adequate means to

prosecute such an inquiry; so he who deals for Personal Assets, is for the same reason absolved from all inquiry with respect to Debts; he has a right to assume that the Executor sells in the necessary course of his Administration; and it is upon this principle altogether indifferent what Dispositions may be made in the Will with respect to the Personal Property for which he deals; for whether it be specifically given, or be a part of the Residuary Estate, it is equally charged by Law with the Payment of Debts; if it were otherwise, the Powers of an Executor would be wholly inadequate to the Administration of the Testator's Estate. In this particular Case, however, the remittance of the Assets to *Ireland* was not necessarily a Breach of Trust in the Executors. According to the declared purposes of the Will, the Executors would have been authorized by the Will to invest the 25,666 *l.* either in the *Irish* Funds, or on Real Security in *Ireland*.

1819.

KEANE
and others,
v.
ROBERTS
and others.

With a view to this Cause, I have carefully examined every Authority upon this subject, and I think the result may be thus stated :—Every Person who acquires Personal Assets by a Breach of Trust, or *Devastavit* in the Executor, is responsible to those who are entitled under the Will, if he is a Party to the Breach of Trust. Generally speaking, he does not become a Party to the Breach of Trust, by buying or receiving as a Pledge for Money advanced to the Executor at the time any part of the Personal Assets, whether specifically given by the Will or otherwise, because this Sale or Pledge is held to be *primâ facie* consistent with the duty of an Executor. Generally speaking, he does become a Party to the Breach of Trust, by buying or receiving in Pledge any part of the Personal Assets, not for Money

1819.

KEANE
and others,
v.

ROBERTS
and others.

advanced at the time, but in satisfaction of his private Debt, because this Sale or Pledge is *prima facie* inconsistent with the duty of an Executor. I preface both these Propositions with the term "generally speaking," because they both seem to admit of Exceptions. Thus, a Sale or Pledge for the private Debt of the Executor has been supported under special circumstances in Lord Hardwick's two Cases of *Nugent v. Giffard* (m), and *Mead v. Orrery* (n), though not entirely to the satisfaction of every succeeding Judge; and Lord Eldon seems to consider the Case of *M'Leod v. Drummond* (o) as an Exception to the first Proposition. It was upon the principles of these Propositions that Sir W. Grant proceeded in the Case of *M'Leod v. Drummond*; he there supported the Pledge of the Testator's Bonds, because they were deposited in respect of Advances made at the time. In the same Case of *M'Leod v. Drummond*, Lord Eldon, on an Appeal, admitted these principles; but as I have already observed, he seemed to consider the circumstances of that Case as forming an Exception to the general Rule. The Advances, though made at the time, were made to two Executors, who were Partners as Army Agents, and were made to them in the course of their Business of Army Agents, and necessarily, therefore, for their private purposes; and he inclined to think that the Bankers were for that reason as much Parties to the Breach of Trust, as if they had applied the Money to pay the private Debt of the Executors. I cannot but lean strongly to Lord Eldon's view of that Case:—If a Party, dealing with an Executor

(m) 1 Atk. 463-4; S. C.
2 Ves. 269.

(n) 3 Atk. 237.

(o) 14 Ves. 358; and S. C.
on Appeal, 17 Ves. 172.

for the Personal Assets, pays his Money to the Executor, so that it may be applied to the purposes of the Will, he is not responsible for the Executor's misapplication of it; but if, 'in dealing with the Executor, he does in truth pay his Money for the private purposes of the Executor, he is equally a Party to the Breach of Trust, whether he applies his Money to the private Debt of the Executor, or to the private Trade of the Executor.

1819.

KEANE
and others,
v.
ROBARTS
and others.

The present Case is not one of Purchase or Pledge from the Executors: it is the Case of Agents of the Executors receiving Monies by the authority of the Executors, and remitting it to them in the course of their duty as Agents, and in the proper forms of Business, leaving the application of it to the purposes of the Will wholly in the power of the Executors.

I cannot, therefore, hold Messrs. *Robarts* and *De Lord* responsible to the Plaintiffs, and the Bill must be dismissed against them; and there being no ground for imputation upon them, I must dismiss the Bill against them with Costs. The Decree is of course against the Executors and their Assignees.



CASES

BEFORE THE

VICE-CHANCELLOR.

CRAWFORD and others v. TROTTER and others.

1819.

LEGACIES were bequeathed in these words: "To my Brother *Charles Crawford*, and to the Heir of his Body, I give and bequeath 1000*l.* Three per cent. Reduced Annuities:—To my Niece *Helen Mayne*, to be secured to her and the Heirs of her Body, I give and bequeath 500*l.* Three per cent. Reduced Annuities:—To Mrs. *Margaret Fletcher*, and to her Issue, I give and bequeath the like Sum of 1000*l.* Three per cent. Reduced Annuities:—To Lady *Scott*, and to her Heirs, (say Children,) I give and bequeath the like Sum of 1000*l.* Three per cent. Reduced Annuities." Lady *Scott* had Children living.

11th February.

Legacies to C. and to the Heir of his Body;" to M. "to be secured to her and the Heirs of her Body;" to F. "and to her Issue," are absolute Legacies: but on a Legacy to S. "and to her Heirs," (say Children,) it was held, that S. was only entitled for Life.

The Vice-Chancellor was of Opinion, that these were all absolute Legacies, except that to Lady *Scott*; as to

1819.

CRAWFORD
and others,
v.

TROTTER
and others.

which, his Opinion was, that she was entitled for life, with Remainder to her Children. The word "Heirs," which was used as synonymous with "Children," importing, that they were to take after her death.

Mr. Farrer, for the Plaintiffs :—

Mr. E. V. Sidebottom, for the Defendants.

28th February.
13th March.

NOVAES and another v. DORRIEN.

Plaintiff brings an Action against the Defendant, and files a Bill in the Court of Chancery for a Commission to examine Witnesses abroad.—The Defendant at Law files a Bill in the Exchequer, against the Plaintiff at Law, for a Discovery; and obtains an Injunction, for want of an Answer, to stay Proceedings at Law.—The Plaintiff at Law afterwards moves in Chancery for a Commission abroad to examine Witnesses. Held, that the Application was restrained by the Injunction in the Exchequer, it being in substance a Proceeding at Law.

THE Plaintiffs, in *Easter* Term 1816, commenced an Action against the Defendant, an Underwriter, to recover 200 *l.* upon a Policy of Assurance; and, on the 9th November 1816, instituted this Suit, praying a Discovery, and a Commission abroad for the Examination of Witnesses residing at *Lisbon*: The Defendant put in his Answer on the 29th January 1817, imputing Fraud to the Plaintiff.

The Defendant also, in February 1817, filed a Bill in the Court of Exchequer, ascribing Fraud to the Plaintiff, and praying a Discovery, and an Injunction, in the mean time, against the Proceedings at Law.

The Plaintiff at Law afterwards moves in Chancery for a Commission abroad to examine Witnesses. Held, that the Application was restrained by the Injunction in the Exchequer, it being in substance a Proceeding at Law.

On the 10th June 1817, the usual Injunction was obtained for want of an Answer.

1819.

On this day, a Motion was made by Mr. *Wingfield*, on behalf of the Plaintiff in the Suit in Chancery, for a Commission to *Lisbon*, for the Examination of Witnesses, supported by the usual Affidavit.

NOVAES
and another,
v.
DORRIEN.

Mr. *Fonblanque*, and Mr. *Raithby*, opposed the Motion, on the ground, that an Injunction against Proceedings at Law had been obtained in the Court of Exchequer; and that this Application must be considered, in substance, as a Proceeding at Law, and prohibited by the Injunction in the Exchequer; and that it was of importance the Bill in the Exchequer should be answered before the Commission issued, that the Defendant at Law might be the better enabled to cross-examine the Witnesses that should be produced under the Commission.

On this day, the *Vice-Chancellor*, after taking time to consider the Practice, observed, that a Proceeding merely in Equity could not be restrained by an Injunction against Proceedings at Law; but that the Commission moved for in this Cause must be considered as a Step in the Proceedings at Law, and as such was restrained by the Injunction in the Court of Exchequer. And added, he did not think it necessary that any application should on this occasion be made by the Defendant to the Court of Exchequer, as this Court will, on this Motion, take notice of the Proceedings which have been had in the Exchequer.

13th March.

1819.

16th March.

FREME and others v. WRIGHT.

Assignees putting up to Sale the Bankrupt's Interest to an Estate "as he lately held the same, an Abstract of which may be seen at the Office of Messrs. T. & Co.;" held, that Vendee could not insist upon any other Title than such as the Bankrupt had.

THIS was a Bill by Vendors, against the Vendee, for a specific Performance. The Plaintiffs were Assignees of one *Howard*, a Bankrupt; and in the year 1816 they put up to Sale by Auction an Estate of the Bankrupt. The Purchaser objected to the Title; and it appearing defective, he was released from his Purchase.

In 1817, the Plaintiffs again put up the Estate for Sale; and the Particulars of Sale, amongst others, contained the following Condition:—

" 4. The Purchaser shall have an Assignment of
" *Mr. Howard's* Interest to one Moiety of the Estate,
" *under such Title as he lately held the same*; an Ab-
" stract of which may be seen at the Office of Messrs.
" *Tomlinsons & Co. Copthall-court*; but the Title-
" Deeds and Leases are to remain in the Possession of
" the Proprietor of the other Half-share."

The Auctioneer, on putting up the Estate, explained to the Bidders that it was a Re-sale, on account of a Defect in the Title; and that the Assignees having rescinded the Contract, again came before the Public with such Title as they had; and that the Purchaser was not to expect a good Title, but to take it as it was.

The Estate was purchased at the Auction, by the Defendant, for 550*l.*; who refused to complete the

Purchase for want of a good Title, and brought an Action for his Deposit and Expenses, but was restrained from proceeding in such Action by an Injunction in this Suit, 22d November 1819, until the Hearing of the Cause, upon the Plaintiff's paying the amount of the Deposit into Court.

1819.

FREME
and others,
v.
WRIGHT.

Mr. *Bell*, and Mr. *James Stephen*, for the Plaintiffs:—

Mr. *Horne*, and Mr. *Roupell*, for the Defendants.

The VICE CHANCELLOR:—

Every Person who proposes an Estate for Sale without qualification, asserts, in fact, that it is his to sell, and consequently that he has a good Title; but a Vendor, if he thinks fit, may stipulate for the sale of an Estate with such Title only as he happens to have; and the question is, Whether these Particulars of Sale import that the Vendors asserted a good Title to the Estate, or meant only to sell such Title as the Bankrupt had?

The fourth Condition of Sale clearly shows that they only meant to sell such Title as the Bankrupt had; and states, that the Abstract of the Title was to be seen, so as to enable any Person who wished to bid, to inform himself of the Title he would acquire.

It is said, the Conditions of Sale were not circulated before the Sale, and that the fourth Condition was only generally made known by the Auctioneer at the Sale, so that no opportunity was afforded to Bidders to inspect the Abstract. That is not very probable. But

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1819.

FRAME
and others,
v.
WRIGHT.

if the Defendant desires it, he may have an inquiry as to that fact.

No inquiry was pressed for; and therefore a Decree was made for a specific Performance, with a Reference to the *Master* to inquire and state under what Title *Howard*, the Bankrupt, held Possession; and the *Master* was to settle a Conveyance according to such Title, with a reservation of further Directions and Costs.

24th November.

1820: 26 Jan.
and 9th Feb.

SIMES v. SMITH (a).

Where a Plea is taken by commission, it does not require the Signature of Counsel.

A PLEA was taken in the Country, and set down to be argued. It was not signed by Counsel, and on that ground Mr. *Wakefield* objected to it, when it was called on to be heard.

Mr. *Dowdeswell*, contra:—

If an Answer is taken in the Country, it need not be signed by Counsel; nor is there any Case where it has been held, that a Plea taken in the Country must be

(a) This Case, owing to an oversight, is misplaced.

so signed. A Demurrer is signed by Counsel, but it cannot be taken by Commission, as a Plea may.

1819.

SIMES

v.

SMITH.

The Commissioners taking the Plea are liable, if there is any thing impertinent in it, or in the Answer in support of it.

Mr. *Wakefield*, in reply :—

A Demurrer must be signed by Counsel, though certainly an Answer taken in the Country need not be so signed. The reason is, a Demurrer requires Judgment, a knowledge of law ; and on the same principle, a Plea ought to be signed by Counsel, because it equally requires legal knowledge and judgment.

The Vice-Chancellor said, that there being no case in point, he would obtain a Certificate of the *Six Clerks*, and of some of the principal *Clerks in Court*, as to the Practice ; and having received their Certificate, His Honor, on the 9th February, 1819, determined, that the Signature of Counsel to a Plea taken by Commission was unnecessary, and, in consequence, the objection to the Plea was overruled.

HENRY WARD and H. STANTON - - Plaintiffs,
and
JOHN MOORE and WILLIAM EBORALL,
Defendants.

1819.

6th May.
15th June.

If the Owner of an unqualified equitable Fee devise it by his Will, and afterwards the unqualified legal Fee is conveyed to him, the Will is not thereby revoked, because such Conveyance was incident to the equitable Fee devised.

But if he afterwards take a qualified Conveyance of the legal Fee, for the purpose of preventing Dower, it is a revocation of the Will, being a change in the quality of the Estate, and not incident to the equitable Fee.

JOHN MOORE (since deceased) being seised of certain real Estates, authorized *Michael Baxter* (since deceased) to purchase a certain other Messuage, Buildings and Lands of a Mr. *Pearston*. *Baxter* accordingly, as such Agent, verbally agreed, in July 1788, with *Pearston* for the Purchase, at the Sum of 700 *l.*, and it was also verbally agreed, that *Moore* should be let into Possession at the ensuing *Michaelmas*, and should then pay his Purchase-money, and have a Conveyance of the Estate. On the 29th of September 1788, Possession was delivered to *Moore*, and he continued in Possession of the same until the time of his death; but there being some objection as to the Title, the Conveyance was deferred. *Moore*, by his Will, 9th December 1788, devised all his Estates to the Plaintiffs, in Trust to sell the same, and with the Produce of the same to pay off Mortgages and the Costs of the Trust and to place the Residue in the Funds, and pay the Dividends to his Wife for life, and after her death, to certain Persons in the Will mentioned.

The difficulties as to the Title to the Estate being removed, a Conveyance was made by *Pearston*, by Lease and Release, dated in July 1789, to *Moore* and *Eborall*, to hold to them, their Heirs and Assigns, to the only proper use and behoof of them, their Heirs and Assigns, subject nevertheless as to the Estate limited to the

use of *Eborall*, his Heirs and Assigns, in trust for *Moore*, his Heirs and Assigns. *Moore* died in January 1790. *John Moore*, the Defendant, was his Heir at Law.

1819.

WARD
and another,
v.
MOORE
and another.

In 1813, the Plaintiffs sold all the Testator's Estates so devised to them, as before-mentioned, except the Estate purchased of *Pearston*, some doubts having arisen whether that Estate passed by the Will; but the Testator's Wife having purchased of the Defendant all his Interest in the Estate for her life, without prejudice to the Claims of any of the Parties, she was permitted to receive the Rents and Profits during her life. She died on the 21st April 1815. Upon her death, the Plaintiffs being desirous of selling the Estate, and to apply the Purchase-money according to the Trusts of the Will, requested *Eborall* to assign the legal Estate to them; and on his refusing to do so, the present Bill was filed, the *Prayer* of which was, that it might be declared that *Eborall* was a Trustee of the Estate under the Conveyance from *Pearston*, of the 24th July 1789, and that he might be directed to convey the same to the Plaintiffs, as Trustees under *Moore's* Will, or join in conveying the same to a Purchaser, when the same should be sold. By the Answers of the Defendants, *Moore* and *Eborall*, the former submitted that the Testator could not be considered as the Owner of the Estate when he took Possession of the same, and that it did not pass by his Will, he not being possessed of the Estate when the Will was made; and that if the Will did pass the Estate, that the Conveyance of the same by *Pearston* to the Testator and *Eborall*, after the making of the Will, revoked the same. *Eborall*, by his Answer, stated, that his Name was inserted in the Conveyance

1819.

WARD
and another,

v.

MOORE
and another.

for the purpose of preventing the Estate thereby conveyed from being subject to Dower, and submitted to act as the Court should direct.

Mr. *Heald*, and Mr. *Phillimore*, for the Plaintiffs :—

The Parol Agreement to purchase, and the Possession, enabled the Devisor to pass the Estate by his Will. In Equity, he was Owner of the Estate, and might devise it (a). Supposing it passed by the Will, the subsequent Conveyance to the Testator and *Eborall* did not operate as a Revocation of the same. There was not any modification of the Ownership that evinced a change of intention; a Conveyance solely to the Testator himself would not have revoked his Will, nor can a Conveyance of the legal Estate taken to the Testator and another, a mere Trustee to prevent Dower, have any other effect. The equitable Ownership still remained in the Testator; he had a sole Seisin in Equity in Fee, though constituted partly of a legal, and partly of an equitable dominion. When the Uses are modified by a Power of Appointment, then a change of intention may be inferred, as was decided by the late Vice-Chancellor, Sir *Thomas Plumer*, in *Rawkins v. Burgis* (b); but even that Decision has been doubted, and an Appeal is now pending to the Lord Chancellor. The Conveyance in this Case was according to the usual mode of Conveyance to a Purchaser, and consistent with the intention of devising the same, as expressed in the Will. They cited *Maundrell v. Maundrell* (c).

(a) As to this point, and that the Estate would pass by the Will, see *Holmes v. Barker*, *ante*, vol. ii. 462.

(b) 2 Ves. & Bea. 382.

(c) 10 Ves. 246.

Mr. *Bell*, and Mr. ——— *contra* :—

Supposing the Parol Agreement and the Possession gave the Testator an equitable Estate, *Moore*, under the Conveyance to him and *Eborall*, took a different and modified Estate, and the Conveyance operated as a Revocation of the previous Will. In these Cases we cannot look at the intention. A Fine or a Recovery subsequent to a Will, though intended as confirmatory of the Will, operates as a Revocation, from the effect of the Conveyance, though contrary to the intention. A Partition, indeed, has been held not to be a Revocation even at Law (*e*). The Conveyance to the Testator and *Eborall* was probably intended to bar a Claim to Dower, though the Court cannot perhaps infer that, as it is not stated in the Bill to have been conveyed for that purpose.

If *Eborall* had died before *Moore*, *Moore* would have taken the whole Estate; but he dying before *Eborall*, the latter takes the whole. *Moore* took by the Conveyance a different Estate from that which he was before entitled to, and had devised, and therefore it was a Revocation.

In *Williams v. Owen* (*f*), the *Master of the Rolls* says, " In *Parsons v. Freeman* (*g*), Lord *Hardwicke* establishes this principle; that wherever the Estate is modified in a manner different from that in which it stood at the time of making the Will, there is a Revocation."

(*e*) See *Luther v. Kidby*, 3 P. Wms. 170, in note; and *Tickner v. Tickner*, cited in *Parsons v. Freeman*, 3 Atk. 741.

(*f*) 2 Ves. jun. 599.

(*g*) 3 Atk. 741.

1819.
WARD
and another,
v.
MOORE
and another.

1819.

WARD
and others,

v.

MOORE
and others.

The Case stood over, and on the subsequent 15th June, the *Vice-Chancellor* gave his Judgment to the following effect :—

If the Owner of an unqualified equitable Fee devise it by his Will, and afterwards take a Conveyance of the unqualified legal Fee, this is no Revocation of the Will, because the Conveyance was incident to the equitable Fee ; as a Partition is no Revocation because incident to a joint Estate. Here the subsequent Conveyance was not such as was incident to the unqualified equitable Fee, but made an alteration in the quality of the Estate, and was therefore a Revocation.

29th June.

BELL and another v. TINNEY and others.

Where there are Infant Defendants, they will not be concluded as to the question of Bankruptcy, by the production of the Commission, &c. under the 49 G. 3, c: 121, s. 11 ; though no Notice has been given on their part of an intention to dispute the Commission.

THE Bill was filed by Assignees of a Bankrupt, to set aside a Settlement made by the Bankrupt after Marriage upon his Wife and Children. There was no other Evidence of the Bankruptcy except the Commission, which the Counsel for the Plaintiffs insisted was sufficient, under the 49 Geo. 3, c. 121, s. 11 ; but the *Vice-Chancellor* held, that as there were Infant Defendants, he would not bind them by the want of the Notice required in the Act ; and directed an Inquiry

before the *Master*, whether a Commission had duly issued against the Bankrupt (g).

1819.

BELL
and another,
v.
TINNEY
and others.

(g) The Act provides, that they or he intend to dispute from and after the passing of the said Trading, Petitioning it, "in all Suits in Equity now Creditor's Debt, or act of Bank- instituted, or to be instituted, ruptcy, or some or one of such by or against any Assignee of matters: and when such No- any Bankrupt, the Commission tice shall have been given, if of Bankrupt, and the Pro- the Assignee shall prove the ceeding of the Commissioners matter so disputed to the satis- under the same, shall be Evi- faction of the Court, the Costs dence to be received of the occasioned by such Notice, to Petitioning Creditor's Debt, shall, if the Court see fit, be and of the Trading and Bank- paid by the Party or Parties ruptcy of such Bankrupt, as giving such Notice to the As- against all the other Parties in signee; and the Service of such Suit; unless such Parties, such Notice may be proved by some or one of them, shall Affidavit, upon the Hearing of within ten days after Rejoinder the Cause."

Writing to the Assignee, that

MACKENZIE v. JOHNSTON, MEABURN
and others.

THE Bill stated, that in April 1817, the Plaintiff, then a Partner with one *Vigurs*, since a Bankrupt, entered into an Agreement with the Defendants, *Johnston* and *Meaburn*, the Owners of a Vessel called the *Jemima*, about to sail for the *East Indies*, to ship a quantity of Earthenware to *Bombay*, to be there sold by their

June.

A Bill for an Account will lie, by the Principal, against an Agent employed to sell Goods for him.

1819.

MACKENZIE

v.

JOHNSTON
and others.

Agents on their Account; and that the Defendants should advance to the Plaintiff and his then Partner 275*l.* 1*s.* 6*d.* on the Credit of the Shipment; and that the Money produced by the sale of the Goods in *India*, after deducting the necessary Expenses incident to such Adventure, and the said Sum of 275*l.* 1*s.* 6*d.* should be paid over to the Plaintiff and his Partner by the Defendants:—That the Shipment was accordingly made, and was consigned by the Defendants, *Johnston* and *Meaburn*, to their Agents at *Bombay*:—That the Partnership of the Plaintiff with *Vigurs* was dissolved on the 30th September 1818, but no Settlement of Accounts ever took place:—That a Commission issued against *Vigurs* on the 1st March 1819, and Assignees (three of the Defendants to the Bill) were chosen:—That *Johnston* and *Meaburn* never accounted for the Proceeds of the Earthenware; and that there is an open and unsettled Account subsisting between them relative thereto; and that upon a fair Statement of their Receipts and Payments in respect of such Adventure, a considerable Balance is due to the Firm of *Vigurs* and Co. from the Defendants, *Johnston* and *Meaburn*.

The Bill, amongst other things, charged, that one of the Items on which the Defendants, *Johnston* and *Meaburn*, claimed to be entitled to a Balance in their favour, was a Charge of 220*l.* 7*s.* 7*d.* for Discount, at 35*l.* per cent. and three per cent. for breakage, upon the Sum at which the Goods were alleged to be sold, which Claim was contrary to the Custom of the Trade. The Prayer of the Bill was for an Account.

The Defendants, *Johnston* and *Meaburn*, put in a general Demurrer for want of Equity.

Mr. *Treslove*, in support of the Demurrer :—

This is not a Case in which a Bill will lie; the Plaintiff's remedy is at Law. He might file a Bill for a Discovery only, but not a Bill for Relief. Lord *Thurlow* says, in *Hoare v. Contencin* (*h*), "As to an Account, this is only a repayment of Money, and that the Money for which the Teas sold shall be deducted." In that Case the Demurrer was allowed. In *Dimwiddie v. Bailey* (*i*), Lord *Eldon* says, "there must be mutual Demands to support a Bill for an Account." In this Case there is only one article to account for, viz. the Cargo of Earthenware; there was no other matter of Account between the Parties.

1819.
MACKENZIE
v.
JOHNSTON
and others.

This is not like the Case of an Account sought against a Factor or Trustee. There was a Case before the late *Vice-Chancellor* (*k*), where the Plaintiff filed a Bill against his Banker for an Account; I demurred to the Bill, and the Demurrer was allowed.

Mr. *Pepys*, *contra* :—

The Defendant was a Trustee for the Plaintiff, which distinguishes this Case from those cited. We say that Credit has not been given for the Goods sold, and are desirous of knowing to whom they were sold, that it may be ascertained what they really sold for.

The VICE-CHANCELLOR :—

The Defendants here were Agents for the Sale of the Property of the Plaintiff, and wherever such a relation exists, a Bill will lie for an Account. The Plaintiff can only learn from the Discovery of the Defendants

(*h*) 1 Bro. C. C. 27.

(*k*) Sir *Thomas Plumer*.

(*i*) 6 Ves. 136.

1819.

MACKENZIE

v

JOHNSTON
and others.

how they have acted in the execution of their Agency; and it would be most unreasonable that he should pay them for that Discovery, if it turned out that they had abused his confidence; yet such must be the case if a Bill for Relief will not lie.

Demurrer overruled.

BIRCH v. GLOVER.

29th June.

Where there is a Devise of real Estate to an Infant, subject to the payment of Debts, the Court will not direct a Sale on the Hearing of the Cause, though the insufficiency of the personal Estate is admitted, until the Master has made a separate Report.

THE Vice-Chancellor held, that if a real Estate devised to an *Infant* is rendered liable to the Payment of Debts, on the Insufficiency of the personal Estate, and it is admitted on the Hearing of the Cause, that the personal Estate is insufficient, a Sale cannot be directed until a Report is made of such Insufficiency; but liberty will be given to the *Master* to make a separate Report.

Where there is a Devise of real Estate to an Infant, subject to the payment of Debts, the Court will not direct a Sale on the Hearing of the Cause, though the insufficiency of the personal Estate is admitted, until the Master has made a separate Report.

THORNHILL v. THORNHILL and others.

1819.

29 June.

GEORGE BARNE devised to his Wife for her life all his Lands, as well Freehold as Copyhold, in *Norfolk*; and directed that his Estate at *Holbeach*, in the county of *Lincoln*, which he had settled before Marriage upon his said Wife for life, together with his Estates lying in the said county of *Norfolk*, which he had given by his Will to her for life, should be sold as soon as might be after her decease, and the Money arising therefrom equally divided among his Nephews and Nieces; the Children of such as should be then dead, standing in the place of their Father and Mother deceased.

Devise of Lands to Testator's Wife for life, with a direction, that after her death the same should be sold, and the Produce divided among his Nephews and Nieces; the Children of such of them as should be then dead, to stand in the place of their Father and Mother deceased. A Niece and Nephew died in the Testator's life-time, leaving Children. Held, that the benefit of the Bequest extended only to such of the Testator's Nephews and Nieces as were in esse at the Testator's death; and to

The Testator died on the 14th March 1788, leaving a Widow and Six Nephews and Nieces; and also leaving the Defendant, Sir *Charles Blois*, who was the only Son of a deceased Niece; and four others, the Children of a deceased Nephew.

One question was, Whether the benefit of the Bequest extended to such of the Children of the Nephews and Nieces who died in the Testator's life-time, or only to such Nephews and Nieces as were *in esse* at the Testator's death?

The Vice-Chancellor was of Opinion, that the Gift to Nephews and Nieces must necessarily be confined

the Children of such of them as should die after the Testator, and before the Testator's Wife.

1819.

THORNHILL

v.

THORNHILL
and others.

to Nephews and Nieces living at the death of the Testator, and that they were to take only if they survived the Wife ; and that if they died after the Testator and before the Wife, then their Children were to stand in their place.

By the Decree, it was " Declared, that the Children of Nephews and Nieces who died before the Testator, *George Barne*, and their Representatives, are not entitled to any Share in the Proceeds to arise from the Sale of the several Messuages, Lands, Tenements and Hereditaments, situate, &c. in the Pleadings mentioned ; and it was ordered, that the Plaintiff's Bill do stand dismissed as against the Defendants, *Sir Charles Blois*, *Arthur William Trollope*, and *Mary Anne*, absolutely, and as against the Defendant, *Thomas Daniel Trollope*, so far as he claims to be interested as a Child of a Nephew who died in the life-time of the said Testator, with their Costs of that Suit to be taxed ; and it was ordered, that such Costs be paid by the Plaintiffs ; and it was ordered, that the Plaintiffs be repaid such Costs out of the Property in question ; and it was ordered, that the said *Master* do inquire, and state what Nephews and Nieces of the said Testator were living at the time of his death, and which of them died in the interim, between the death of Testator and the death of the said *Anne Barne*, the Tenant for Life ; and whether they left any and what Children, and which of those Children died before the death of the said *Anne Barne*, the Tenant for Life, and who were their personal Representatives, &c."

ANONYMOUS.

1819.

9th July.

IN this Case, the *Vice-Chancellor* held, that if a Matter in Bankruptcy is referred to a *Master*, and he finds it necessary to examine Witnesses, a Certificate to the Court must be made by him of the necessity of such Examination, and the Court will thereupon make an Order accordingly.

Ex parte BELLOTT, *in re* LINGARD.

2 *Lin* 456

Same Day.

AN Order had been made in Bankruptcy, referring a Solicitor's Bill to be taxed, and reserving the question as to the Costs of the Taxation. The Costs were taxed, and one-sixth of the amount of the Bill delivered taken off upon such Taxation. The Solicitor brought an Action for the amount of the taxed Costs, without deducting the Costs of the Taxation; and the present Petition was presented to stay the Proceedings at Law; and the doctrine of Lord *Redesdale*, in the *Matter of Dillon* (a).

Order in Bankruptcy, referring a Solicitor's Bill to a Master for Taxation, reserving Costs of Taxation. Bill taxed, and more than one-sixth taken off. The Solicitor brings an Action for the taxed Costs, without deducting the Costs of Taxation. On

The *Vice-Chancellor* referred it to the *Master* to tax the Costs of the Taxation of the Bill, and directed the

(a) 2 Sch. & Lefr. 110.

Petition, the Action was staid, and a Reference made to the Master to tax the Costs of the Taxation of Costs; and after deducting the Amount thereof from the taxed Costs, the same were ordered to be paid to the Solicitor.

1819.

Ex parte
BELLOTT,
in re
LINGARD.

same to be deducted from the Amount of the taxed Costs ; and that the taxed Costs, after such Deduction, be paid to the Solicitor ; and that the Action at Law should be staid.

COOKE v. WILSON.

10th July.

Depositions on the part of the Defendant suppressed after Publication, because the Clerk of the Defendant's Solicitor acted as Clerk to the Commissioners.

A MOTION was made on behalf of the Plaintiff to suppress the Depositions taken and published in this Cause, for irregularity in the execution of the Commission. The irregularity complained of, was, that a Clerk to the Solicitors of the Defendants was employed by the Commissioners in taking, writing, transcribing and engrossing the Depositions.

Mr. Agar, and Mr. Duckworth, in support of the Motion, cited *Newton v. Cooke (a)*, and *Selwyn's Case (b)*, where the Defendants Depositions were suppressed, because the Solicitor of the Defendants was one of the Commissioners.

Mr. Heald, and Mr. Alcock, *contra* :—

No injury appears to have arisen from the oversight in employing this person as Clerk ; for he swears he

(a) 2 Dick. 793 ; S. C. under name of *Newte v. Foot*, 2 Ch. Rep. 178. (b) 2 Dick. 563.

never disclosed any part of the Depositions; and that he did not, before nor after the execution of the Commission, interfere in the managing, conducting, or carrying on of the Cause. Besides, the nature of the Suit is such, that a knowledge of the Depositions could be of no use.

1819.
COOKE
v.
WILSON.

The VICE-CHANCELLOR:—

No Person can take part in the execution of a Commission who is not wholly indifferent, and a Solicitor's Clerk is within the policy which excludes Solicitors.

GRAVES v. HUGHES.

23d July.

JOHN COATES being entitled to the sum of 2,000 l. in right of his Wife, the Testatrix, which was on Mortgage to Sir *Thomas Mostyn*, they made a Settlement on the 10th and 11th June 1757, by which the Testatrix, by a Codicil to her Will, bequeathed to W. H. and M. H. an Arrear of Interest, due on a Mortgage, amounting to 600 l. as she computed the same.

After the making of the Codicil she lived eleven years, and received Interest from the Mortgagor to the amount of 648 l.

On a Reference to the Master, he found that 646 l. 8 s. 3 d. was due to the Testatrix for Interest when she made her Codicil; and that a sum to that amount was due to her for Interest when she died; and, upon the Affidavit of F. he found that the Interest received by the Testatrix after the making of her Codicil, was so received in respect of Interest as it accrued due after the making of the Codicil, leaving outstanding the Arrear of Interest due when she made the Codicil.

Held, that the Legacy was not reduced by the receipt of Interest subsequent to the making of the Codicil.

1819.

GRAVES

v.

HUGHES.

2,000 *l.* was conveyed to a Trustee, in Trust to pay the Interest to them for their lives, and to the Survivor for his or her life; and to pay 200 *l.* part of the 2,000 *l.* as they should appoint, and the residue to their Children; and if no Children, to the Survivor. In 1758 they assign 150 *l.* as a Security to that Amount, with Interest at four per cent. to *Owen Ellis*; and in 1759 they assign 50 *l.* to *Jane Smith*, as a Security for that Sum, and four per cent. Interest. *Owen Ellis* in 1763 assigned the Security for the 150 *l.* to *Richard Lloyd*; and in June 1770, *Jane Smith* also assigned to him her Security for 50 *l.* *Jacob Coates*, the Husband, died without Issue, and by his death, his Wife, the Testatrix, became absolutely entitled to the 2,000 *l.* subject to the Payment of the 200 *l.* which had been assigned as a Security, and vested in *Lloyd*. The Interest on the 200 *l.* was regularly paid by Sir *R. Mostyn*, and on the 22d February 1786, Sir *R. Mostyn* paid off the 200 *l.* due to *Lloyd*, but there was no Evidence to show whether such Payment was made by the direction or with the consent of the Testatrix. Sir *R. Mostyn* from time to time paid several Sums on account of Interest, and such Payments consisted of Sums on Account to the month of September 1786, but from that time to the death of the Testatrix, in April 1797, the sum of 36 *l.* (being the amount of Interest on 1,800 *l.* at four per cent.) was paid half-yearly. The Testatrix by her Will, dated the 10th April 1788, after directing her Debts, and those of her late Husband, and Funeral Expences, to be in the first place paid, and after reciting that she was entitled to a sum of 2,000 *l.* or thereabouts, with an Arrear of Interest, due on Mortgage or otherwise, from Sir *Roger Mostyn*, Bart. and also to a Moiety of the Purchase Money for the *Gopp* Estate,

1819.

GRAVES

v.

HUGHES.

purchased by him from her and her two Sisters, the amount of which had not been ascertained; she bequeathed to her Maid Servant, *Mary Hughes*, the sum of 800*l.* to be paid within three months after the Testatrix's decease; and to the Defendant, *William Hughes*, the sum of 200*l.* to be paid at the same period; and after giving some small pecuniary and some specific Legacies, she gave the residue of her Property to the Three Children of her Nephew, *Thomas Welchman Wynne*, equally to be divided between them. By a Codicil to her Will, dated the eleventh day of the same month of April, after reciting that the said Sir *Roger Mostyn*, Bart. then stood indebted to her in the sum of 2,000*l.* which she had taken notice of in her Will, on which Sum there was a considerable Arrear of Interest, amounting to 600*l.* and upwards, due to her, as she computed the same; she by her said Codicil bequeathed all the said Arrear of Interest so due for the said 2,000*l.* be the same more or less, unto the Defendant, *William Hughes*, and her Maid Servant, the said *Mary Hughes*, equally to be divided between them; and the Testatrix further directed, that the residuary Legatees named in her Will should not claim any right or benefit to the Interest of the said 2,000*l.* thereinbefore bequeathed, or any part thereof. On a Reference to the *Master*, he made his Report; and Exceptions were taken, and in particular as to that part of the Report which related to the Legacy to *Mary Hughes*, by the Codicil, of the Arrear of Interest in respect of the Mortgage of 2,000*l.* mentioned in the Testatrix's Will, the *Master* being of opinion, that the Bequest passed all the Interest on the 2,000*l.* Mortgage due at the Testatrix's death, whereas it was insisted, that the Bequest

1819.

GRAVES

v.

HUGHES.

passed only the amount of the Interest due at the time of making the Will. On the hearing of the Exceptions, 22d April 1819, the *Vice-Chancellor* referred it back to the *Master* to review his Report, and to inquire what was the amount of the Arrears of the Interest due to the Testatrix at the time of making the Codicil, as she computed the same; and whether any and what of such Arrears remained due to the Testatrix at the time of her death; and the *Master* was to state any circumstances specially. The *Master*, by his reviewed Report, 22d April 1819, stated, he found that on the 11th day of April 1788, the time of making the Codicil in the said Order mentioned, the sum of 646 *l.* 8 *s.* 3 *d.* was due to the Testatrix for Arrears of Interest, as he computed the same. And he found, that in computing the Principal and Interest due to the said Testatrix at the time of her death, as certified by his said Report of the 10th day of February 1819, he considered the said sum of 200 *l.* paid by the said Sir *Roger Mostyn* to the said *Richard Lloyd*, as having been paid on account of Interest, it having been so considered by *Master Thompson* in taking the Account of Principal and Interest due on the said Mortgage, in pursuance of a Decree made in a Cause instituted by *William Hughes*, one of the Defendants in this Cause, and since deceased, against Sir *Thomas Mostyn*, the Owner of the mortgaged Premises, and *John Welchman Wynne*, one of the Plaintiffs in this Cause; but considering the said sum of 200 *l.* paid by the said Sir *Roger Mostyn* to the said *Richard Lloyd* as aforesaid, payment of part of the said principal sum of 2,000 *l.* the said sum of 646 *l.* 8 *s.* 3 *d.* was in fact the amount of the Arrears of Interest due to the said Testatrix at the time of making the said Codicil; and as to the

1819:

GRAVES
v.
HUGHES.

said Inquiry, whether any and what part of such Arrears remained due to the said Testatrix at her death, he found that the Sums received by her in her life-time for Interest, after making the said Codicil, amounted to the sum of 648*l.*; and the Affidavit of *John Faulkner*, of, &c. had been laid before him on the part of the Defendants, in which the said *John Faulkner* stated, that he well knew *Jane Coates*, the Testatrix, he having been for fifteen years and upwards prior to her death Clerk to Mr. *Charles Hamilton*, then deceased, her late Solicitor; and that he was well acquainted with the circumstances relating to the Mortgage which was due to the said *Jane Coates* at the time of her death, from the late Sir *Roger Mostyn*, and the Interest thereon, having had frequent conversations with the said *Jane Coates* on the subject thereof:—That the said *Jane Coates* being greatly distressed, on account of the Agent of the said Sir *Roger Mostyn* having for a number of years paid her considerably less than the amount of the Interest which she conceived herself entitled to receive, employed the said *Charles Hamilton* to obtain regular Payment of the full Amount of the same, and also to obtain an Account of the Arrear of Interest which had accrued to that time:—That in consequence thereof, the said Mr. *Hamilton* applied to the late *William Wynne*, Esq. of *Mold*, as the Agent of Sir *Thomas Mostyn*, for the purposes aforesaid; and in consequence of his Application, the half-yearly Payments were increased to 36*l.*; and that the said *Charles Hamilton* also obtained from the said *William Wynne* a Statement of the Sums of Money which had been paid on account of the Interest of the said Mortgage Money from the year 1768, and

1819.

GRAVES

v.

HUGHES.

that the said Account was delivered to the said Mr. *Hamilton* some time after the said *Jane Coates* made her Will and Codicil; and that upon the Delivery of the said Account, the said *Jane Coates* was desirous of having the Arrear of Interest paid to her, but the said *Charles Hamilton* could not obtain Payment of the same, or any part thereof, and the Applications for Payment of the same ceased, under the impression that it would not be obtained till the ending of the Suit which was then depending in this Court, between the said Sir *Roger Mostyn* and the Persons interested in the Estate of which the said Mortgage was made:—That although the said *John Faulkner* does not recollect on what precise ground less than the full Interest of 2,000*l.* was paid, after the said Mr. *Hamilton's* applications to the said *Willidm Wynne*, as thereinbefore mentioned, from his conversation with the said *Jane Coates*, the Testatrix, he, the said *John Faulkner*, was enabled to state positively, that she considered the half-yearly Payments of 36*l.* as the whole of the Interest she was then entitled to receive; and that by receiving the half-yearly Payments of 36*l.* from the time of making her Codicil, dated the 11th day of April 1788, it was not the intention of the said Testatrix to receive any part of the Arrear of Interest due to her at the time of making her Codicil, but that she did consider that she was receiving the Interest which was accruing due to her as often as she received the same; but no other Evidence had been produced before him to show whether such Sums so received for Interest were paid by the said Sir *Roger Mostyn*, as the Owner of the mortgaged Premises, to the said Testatrix, or considered by her as received in or towards the

Discharge of the Arrears of Interest due to her at the time of making the said Codicil, or for the Interest which became due subsequent to the time of making the same The Cause now came on upon further Directions.

1819.

GRAVES
v.
HUGHES.

Mr. Heald, and Mr. Maddock, for the Plaintiffs:—

The Testatrix, by her Codicil, states an Arrear of Interest to be due to her to the amount of 600*l.* as she computed the same; and she bequeaths this Arrear of Interest so due to *William Hughes* and *Mary Hughes*. The Master finds, that at the time of making the Codicil, the Arrear of Interest due to the Testatrix was 646*l.* 8*s.* 3*d.*; but the Master also finds, that after the making of her Will, she received Interest to the amount of 648*l.* The Money thus received must be considered as discharging the Interest which was due when the Testatrix made her Codicil, and in consequence, the Interest due when the Codicil was made became no longer due, and the Legacy of the Interest then due was adeemed. When Payments are made by a Debtor, he may direct them to be applied in payment of a Debt recently incurred, and not in discharge of an older Debt; but if he says nothing about it, the Creditor may apply it to which Debt he pleases (a); or rather, according to some Cases (b), if no particular Directions are given at the time of payment to what Account the Payment should be applied, the Creditor must apply it to the older Debt. In some Cases it seems to have been considered, that when a Debt was given by way of Legacy, and the Debt was afterwards voluntarily paid in, it was not

(a) *Piters v. Anderson*, 5 Taunt. 601. (b) *Dawn v. Holdsworth*, Peake's N. P. 598.

1819.

GRAVES

v.

HUGHES.

that 2,000*l.* was due on the Mortgage: but this is evidently a slip in the expression; for after that Payment she never received, in respect of the Interest as it accrued due, any more than the sum of 72*l.* a year, which was the amount of four per cent. Interest on 1,800*l.* This Interest only she received from the time the 200*l.* was paid, up to the time of her death, a period of eleven years; which clearly shows, that she considered the principal sum of 2,000*l.* originally due on the Mortgage, as having been reduced to 1,800*l.* by the payment of the 200*l.* I am therefore of opinion with the *Master*, that in calculating the amount of the Interest due to the Testatrix, the 200*l.* ought not to be taken into the Account.

ANNESLEY and others v. SIMEON and others.

28th July

Cestuis que Trust, bringing Action in Trustee's Name, ordered to give Security for Costs.

THE question in this Cause was, For which of the Parties Sir John Simeon was to be considered as a Trustee? He was made a Co-defendant in the Suit; and stated in his Answer, that he did not know for which of the Parties he was to be considered as a Trustee.

The other Co-defendants, considering themselves as the *Cestuis que Trust*, brought an Action in the name of Sir John Simeon, their alleged Trustee.

Sir John Simeon applied for an Indemnification against the Costs of the Proceedings at Law in his Name; and

the *Vice-Chancellor* was of Opinion, (after some hesitation, as he was merely a Co-defendant,) that he might restrain the Defendants from proceeding in the Action, until Security was given for the Costs of the Action.

Mr. *Bell*, for the Motion :—

Mr. *Barber*, *contra*.

1819.

ANNESLEY
and others,
v.
SIMEON
and others.

IREMAN v. MIDLAND.

THE Defendant by her Answer admitted, that at a time past she had a certain Deed in her power. Mr. *Shadwell* moved for a production of the Deed ; but the *Vice-Chancellor* held, there was not a sufficient admission in the Answer to warrant the Order, as she did not admit that she had *then* the Deed in her power.

4th August.

LANN v. CHURCH.

THIS was a Petition by a Solicitor, that a Sum decreed to his Client, the Plaintiff in this Cause, might be applied in discharge of his the Solicitor's Costs in

Costs in that Suit ; he cannot claim the amount of other Costs due to him in other Suits.

5th August.

17 Jan. 1830.

A Solicitor has no Lien on a Fund decreed to his Client beyond his

1819.

LANN

v.

CHURCH.

this Cause; and also in payment of other Costs, not Costs in this Cause, due to him from the Plaintiff.

Mr. G. Wilson, in support of the Petition, contended it ought to be granted; but admitted he could not, as to Costs not in the Cause, find any Authority expressly in point.

Mr. Horne, *contra* :—

The Solicitor has a Lien only for Costs in the Cause; the Lien has never been extended so far as is sought by this Petition. His Bill has not yet been taxed.

The *Vice-Chancellor* desired the Case to stand over, in order that he might inquire into the Petition.

The Parties afterwards compromised the Claim; but the *Vice-Chancellor* said he thought it proper to state, that he had not been able to find any Case in which it had been held that a Solicitor had any Lien on the Fund recovered in the Cause, except for his Costs incurred in such Cause.

30th June.

9th August.

DIXON v. WYATT.

If a Creditor files a Bill on behalf of himself and other Creditors, and a Decree is obtained, and the Plaintiff dies,

THIS was a Bill filed by one Creditor on behalf of himself and other Creditors; and a Decree had been made in the Cause.

The Creditor who instituted the Suit, died; and Mr. Wakefield now moved, that another Creditor who another Creditor may obtain an Order to file a Supplemental Bill, if the Representatives of the deceased Plaintiff do not revive within a limited time.

had proved his Debt under the Decree might be substituted as Plaintiff, in the place of the deceased Creditor.

1819.

DIXON

v.

WYATT.

The *Vice-Chancellor*, not being aware of a similar Order, requested the *Registrar* to search whether any such Order had been made.

On the 9th August, the *Vice-Chancellor* stated, that as the Representatives of the deceased Creditor had an interest in the prosecution of the Suit, in respect of the Costs already incurred in it, that no other Creditor was at liberty to file a Supplemental Bill without Notice to such Representatives; and that the proper course was for the Creditor desiring to prosecute the Suit, to move, that he might be at liberty to file a Supplemental Bill, if the Representatives of the deceased Plaintiff did not revive within a limited time; and to serve the Order upon such Representatives.

FIELDING v. CAPES.

IN this Case, a Motion *Nisi* to dissolve an Injunction, which had been obtained to restrain Proceedings at Law, was made at the last Seal after *Trinity Term*, and the usual undertaking was given to show cause upon the merits; but as the continuance of the Injunction would prevent the Trial taking place before the next Seal, the *Vice-Chancellor* (after taking time to inquire into the Practice) appointed a day during the Petitions for showing cause (a).

9th August.

(a) S. P. *Rew v. Dixon*, *ante*, vol. ii. p. 258.

1819.

11th August.

Bankrupt obtaining leave to surrender after the time for surrendering is expired, pays the Costs.

Ex parte CARTER.

A BANKRUPT, after the time of surrendering under his Commission had expired, applied for leave to surrender at a private Meeting, which under the circumstances was granted; but a question arose, Who was to pay the Expenses of the Meeting for the purpose of taking the Surrender? The Bankrupt, by his Petition, had prayed, that the Costs of the Surrender might be paid out of his Estate.

The VICE-CHANCELLOR:—

It is not usual, nor reasonable, that the Estate should pay the Costs of this Indulgence afforded to the Bankrupt.

Mr. Treslove, for the Petition.

Ex parte LEIGH.

11th August.

THIS was a Petition for leave to except to the *Master's* Report of Costs.

The *Vice-Chancellor* made the Order, but stated, that such an Application being in the nature of an Appeal, the Petitioner must pay the taxed Costs into Court.

Ex parte NORTH, *in re* COLEMAN.

1819.

THE *Vice-Chancellor* held, that an Affidavit of personal Service of a Petition must be filed before it can be read in Court.

12th August.

Ex parte SUTTON, *in re* BRERETON.

12 & 13 August.

ON a Petition by a Creditor to refer to the Master a Solicitor's Bill of Costs up to the choice of Assignees which had been taxed by the Commissioners, Mr. *Rose* cited as authority for it, two Cases in *Cooke* (a), and *Ex parte Westall* (b). The *Vice-Chancellor* held, that such a Petition was not of course; that the Statute gave authority to the Commissioners to tax the Costs up to the choice of Assignees, and that their Judgment must stand until it was shown to be erroneous. Mr. *Rose* then stated, that the Bill amounted to 124*l.* and that such Costs in general did not exceed 50*l.* His Honor thought that was not sufficient, without a more particular Statement of the Objections to the Bill. Mr. *Rose* then observed, that the Solicitor had refused to give a Copy of his Bill, so that the Petitioner was unable to state specific Objections to particular Charges; and on that ground, the *Vice-Chancellor* made the Order of Reference.

It is not of course to refer to the Master a Bill of Costs, up to the choice of Assignees, already taxed by the Commissioners. Particular Objections must be stated. If the Solicitor refuses to give a Copy of his Bill, a Reference will be made.

(a) *Ex parte* Vincent, March 24, 1786; and *Ex parte* Clarke and Cogan, *Cooke's B. L.* p. 8; and see *Ex parte* Smith, 5 Ves. 706.
(b) 3 Ves. & Bea. 141.

1819.

1st November.

A Plaintiff moving, as of course, to amend his Bill, after he has taken Exceptions to the Answer, waives his Exceptions: he must move specially for liberty to amend, without prejudice to the Exception.

DE LA TORRE v. BERNALES.

ON the 24th July 1819, the Plaintiff obtained an Order for liberty to file Exceptions *nunc pro tunc* to the Defendant's Answer, and on the same day moved to amend the Bill. Both Orders were served on the 17th July 1819. On the 28th July 1819, an Order was made to refer the Exceptions, and on the subsequent 4th of August, a Warrant of the *Master* was served, to argue the Exceptions, which were objected to before the *Master* as irregular. The *Master*, however, proceeded to make his Report upon the Exceptions.

On this day, Mr. *Pepys* moved that the Order of the 28th July might be discharged, and all further Proceedings thereunder might be stayed, on the ground that the Petitioner having obtained an Order to amend generally, he could not afterwards refer the Defendant's Answer for Insufficiency, or proceed under a previous Order obtained for that purpose; and he cited *Taylor v. Wrench* (a), where the Defendant moved to discharge an Order referring Exceptions to the Answer, on the ground that the Petitioner had amended the Bill previously to taking the Exceptions; and the *Lord Chancellor* admitting the general Rule, thought that an excepted Case, as the Amendment was only of the mere addition of a Defendant requiring no further Answer.

Mr. *Roupell*, *contra*:—

This Case falls within the Exception of *Taylor* and *Wrench* (b). For the only Amendment here was the

(a) 9 Ves. 315.

(b) *Ibid.*

1819.

DE LA TORRE
v.
BERNALES.

Prayer of Process against one of the Defendants, which was a mere clerical Omission, and the Amendment required no further Answer. - They do not move to discharge the Order for leave to file Exceptions to the Answer *nunc pro tunc*, but only move to discharge the Order referring the Exceptions, which was only a consequence of the former Order, and must be valid so long as the former Order stands.

The VICE-CHANCELLOR :—

If a Plaintiff excepts to an Answer, and afterwards moves to amend his Bill, that operates as a waiver of the Exceptions to the Answer ; for the Plaintiff by the Amendments may strike out the very Passages in respect of which the Answer was excepted to. Where the Plaintiff, after Exceptions taken to an Answer, is desirous of amending his Bill, without prejudice to the Exceptions previously taken, there should be a special Motion to that effect (c). Such a special Motion might properly have been made in this Case, as the intended Amendment is only as to the Prayer of Process, and requires no further Answer ; and this Proceeding has been a mere slip. Let the Order to amend be discharged, and take another Order for liberty to amend, by praying Process against the Defendant, as to whom you have omitted to pray Process, without prejudice to the Exceptions taken to the Answer ; and let the *Master* review his Report upon the Exceptions, the Plaintiff paying the Costs of this Motion.

(c) See *Jacob v. Hall*, 12 Ves. 458.

1819.

3d November.

JEFFERY and others v. Sir J. C. HONYWOOD.

Devise to M. J. and to all and every the Child and Children, whether Male or Female of her Body lawfully issuing, and unto his her and their Heirs, as Tenants in Common.

Held, that M. J. took an Estate for life, with Remainder to her Children, as Tenants in Common in Fee.

THIS was a Bill for the specific Performance of an Agreement to purchase certain Premises. The Vendee objected a want of Title. The question in the Cause arose upon a Will, by which the Testator gave certain Estates, subject to some Charges thereon, unto his Daughter *Mary*, the Wife of *T. W. Jeffery*; and to all and every the Child and Children, whether Male or Female, of her Body lawfully issuing; and unto his, her and their Heirs or Assigns for ever, as Tenants in Common, and not as Joint Tenants.

At the date of the Will, *Mary Jeffery* was living, but she died in the life-time of the Testator, leaving Ten Children, the Plaintiffs.

The question was, Whether One-eleventh Share of the Estates lapsed by the death of *Mrs. Jeffery* in the life-time of the Testator, and descended to his Heir at Law; or whether the Entirety of the Premises passed to the Plaintiffs under the Will? In other words, Whether *Mary Jeffery* was intended to take together with her Children as Tenants in Common in Fee; or whether she was intended to take the whole for her life, with Remainder to her Children?

Mr. Bell, and *Mr. Sugden*, for the Plaintiffs:—

Mrs. Jeffery took only an Estate for life. In *Doe v. Burnshall* (a) there was a Devise to the Niece of *A. O.* and the Issue of her Body as Tenants in Common, if

(a) 6 T. R. 30.

more than one; but in default of such Issue, or being such they should all die under the age of twenty-one, and without leaving lawful Issue of any of their Bodies, then over. This it was held gave only an Estate for life to *A. O.* the Niece. So in *Doe v. Laming (b)*, there was a Devise to *A. C.* and the Heirs of her Body lawfully begotten or to be begotten, as well Females as Males, and to their Heirs and Assigns for ever, to be equally divided, as Tenants in Common; and it was held, that *A. C.* took only for Life, and the Children in Fee. In *Hockley v. Mawbey (c)*, Mr. *Lloyd* cited an anonymous MS. Case, which he had compared with the Registrar's Book, and found correct. *A.* devised to *B.* and his Heirs Male, equally to be divided between them, share and share alike. *B.* had four Children, and the Court held, that *B.* took for Life only, and the Principal was to be divided among his Heirs Male equally. These Cases are decisive to show that *Mary Jeffery* took only an Estate for Life, and the Children, the Plaintiffs, in Fee. The Case of *Oates v. Jackson (d)* will probably be insisted upon on the other side; but in that Case there was an express Estate for Life devised to the Wife, as appears in the Report of it in *Modern Reports (e)*, and after her decease to his Daughter, and to the Children of her Body begotten or to be begotten by *W. A.* and to their Heirs for ever; so that the Daughter and her Children took as Joint Tenants. In that Case, the Court relied upon the doctrine in *Co. Litt. (f)*, which related to a Feoffment, and is

1819.

JEFFERY
and others,
v.
HONYWOOD.

(b) 2 Burr. 1100.

(c) 1 Ves. jun. 145.

(d) 2 Str. 1172.

(e) 7 Mod. 439.

(f) P. 9 a. The words are,

" *B.* having divers Sons and Daughters, *A.* giveth Lands to *B. et liberis suis, et a lour heires*; the Father, and all his Children, do take a Fee-

1819.

JEFFERY
and others,
v.
HONYWOOD.

inapplicable to a Case upon a Devise. In this Case the Devise is to *Mary Jeffery*, and to all and every the Child and Children, &c. and unto his, her or their Heirs and Assigns for ever, as Tenants in Common. The sentence is broken. The Devise is not to *Mary Jeffery* and her Children and their Heirs, but to her and to the Children. There is therefore a separate, independent Gift to the Children, and this is followed by the words, and unto his, her and their Heirs, &c. As the Devise was to the Child and Children, the Testator proceeds to give it to his, her or their Heirs, to provide for the event of there being only one, whether Male or Female, or of there being more than one; but if he had intended the Mother and Child or Children to take the Fee, in all events there would have been more than one to take, and he would have said generally, and their Heirs; or had he used words referring distributively to the Heirs of each, he would naturally have referred to the Parent before the Children, and have said, her, his or their Heirs. When was the Division to be made, if the Wife took as Tenant in Common with her Children born and to be born? Upon the whole, it seems clear that *Mary Jeffery* took for Life, with Remainder to her Children, the Plaintiffs, in Fee, and consequently that they are able to make a good Title.

Mr. *Hodgson*, for the Defendant :—

There is certainly a conflict of Cases on the question now agitated. The doctrine in *Wilde's Case* (g), which

simple jointly by force of these words, (their Heirs;) but if he had no Child at the time of the Feoffment, the Child born afterwards shall not take.” (g) 6 Co. 17 a.

arose upon a Will, is in favour of the Defendant. The Resolution there was, that “ if *A.* devises his Land to *B.* and his Children or Issues, and he hath not any Issue at the time of the Devise, that the same is an Estate Tail, for the intent of the Devisor is manifest and certain that his Children or Issues should take; and as immediate Devisees they cannot take, because they are not *in rerum natura*; and by way of Remainder they cannot take, for that was not his intent, for the Gift is immediate; therefore there, such words shall be taken as words of Limitation *scil.* as much as Children or Issues of his Body, for every Child or Issue ought to be of the Body; and therewith agrees a Case, *Trin. 4 Eliz.* reported by Serjeant *Benloes*, where the Case was, that one devised Lands to Husband and Wife, and to the Men-children of their Bodies begotten, and it did not appear in the Case that they had any Issue Male at the time of the Devise, and therefore it was adjudged that they had an Estate Tail to them and the Heirs Male of their Bodies; but if a Man devises to *A.* and to his Children or Issue, and they then have Issue of their Bodies, then his express intent may take effect according to the rule of the Common Law; and no manifest and certain intent appears in the Will to the contrary, and therefore in such case they shall have but a Joint Estate for Life.” This doctrine has been ever since followed. In *Oates v. Jackson* it was relied upon. That Case is expressly in point with the present. The only difficulty there was as to after-born Children. In that Case, according to the Report of it in *Modern Rep.* the Devise was to *Isabella* and to her Children begotten or to be begotten. The only circumstance in which the present Case differs from *Oates v. Jackson*,

1819.

JEFFERY
and others,
v.
HONYWOOD.

1819.

JEFFERY
and others,

v.

HONYWOOD.

is, that here the Devisees take as Tenants in Common, and there they took as Joint Tenants; but in that Case, Ch. J. *Lee* doubted whether the Devisees were not Tenants in Common, but seems to have thought that made no difference. In the *Anonymous* Case, cited by Mr. *Lloyd* in *Vesey*, it does not appear that *B.* had any Children living at the date of the Will, and on that the whole question turns. In *Doe v. Burnsall*, it was clear the Condition did not apply to *Mary*, the Wife, but to the Parties in whom the Fee was to vest, and consequently she could not take the Fee; and in that Case it does not appear that *Mary* had any Children living at the date of the Will. It is clear, therefore, as I submit, that one-eleventh Share of this Estate was absolutely bequeathed to Mrs. *Jeffery*; and that by her death, in the life-time of the Testator, the Devise lapsed, and that her Share went to the Heir at Law of the Testator; and therefore the Plaintiffs cannot make a good Title, unless the Testator's Heir at Law joins in the Conveyance.

The VICE-CHANCELLOR:—

The question is, What Estate *Mary Jeffery* was intended to take under the Will of her Father, whether for Life, or as Tenant in Common in Fee with her Children? It is plain, that after-born Children would be included in this Devise; and it is a singular intention to impute to a Father, that he means his Daughter's personal Interest in the Estate should continually diminish upon the birth of a new Child. It is admitted, that the Daughter either takes the Whole for Life, or a Share in Fee. I am of Opinion, that the Limitation of the Fee here is confined to the Children; and that the Mother

cannot be comprehended in the expression "his, her or their Heirs and Assigns." I consider, therefore, that there are two Gifts, one to the Mother, without Words of Limitation superadded; and another to her Children, their Heirs and Assigns. And these two Gifts can only be rendered sensible by construing, as the words import, a Life Estate to the Mother, and a Remainder in Fee to the Children.

1819.
JEFFERY
and others,
v.
HONYWOOD.

In *Oates v. Jackson*, the Mother was, by the plain force of the expression, comprehended in the Limitation in Fee; and I cannot consider that Case either as ruling the present Case, or as inconsistent with the other Authorities which have been cited.

TOLSON v. LORD FITZWILLIAM.

THE *Vice-Chancellor* held, that when a Demurrer is struck out of the Paper for want of Appearance, it cannot be again set down without an Order; and that formerly it was the Practice to make the Order only upon Petition, but that it is now done also by Motion. 4th November.

1819.

5th November.

FRENCH v. MYLES and others.

In Schedules annexed to an Answer there was a material Error, which was only discovered on taking an Account before the Master. Upon Petition and Affidavit, the Defendants were allowed to put in Supplemental Schedule.

THE Plaintiff, together with *George Russell*, (since deceased,) and the Defendant *Robert Nixon*, were in Partnership; and it was agreed the Business should be sold, together with the Stock and certain Partnership Premises. A Sale took place in the life-time of *Russell*, and was managed by him; and he received the outstanding Partnership Debts; but a considerable part of the Partnership Stock and Effects remaining unsold, were after his death sold by his Executors. The present Bill was filed against the Executors of *Russell*, and the Assignees of *George Sharpe* and his Sons, Bankrupts; (which *George Sharpe* was one of the Executors of *Russell*, who principally acted in the management of the Executorship, and who had paid the Monies received into a House carried on by him under the firm of *George Sharpe & Sons*;) praying, for an Account of the Partnership Estate, and the Produce thereof; and that the Plaintiff, and the Defendant *Robert Nixon*, might be paid their Shares of the same. Answers were put in to the Bill; and to the Answer of the Assignees of *Sharpe & Sons* three Schedules were annexed. The Cause was heard; and a Decree made, directing an Account. On the taking of the Account before the Master, the second and third Schedules annexed to the Answer of *George Sharpe* and his Assignees was offered as Evidence in support of a Charge carried in by the Plaintiff: it was then discovered that there was a material Error in the Heading of the second and third Schedule. The second Schedule was headed thus: "How much and what part of the Partnership Estate

and Effects of *Russell & Co.* and the Monies produced thereby, remained in the hands of the said Testator at his death, and came to the hands of *George Sharpe* and his Co-executors, or any of them; and what they have done therewith;" whereas it ought to have been described as "The Account of the Receipts and Payments of the House of *George Sharpe & Sons*, in Account with the Executors of *George Russell*."

1819.
FRENCH
v.
MYLES
and others.

The third Schedule was headed thus: "An Account of such part of the said Co-partnership Estate and Effects of the said *George Russell* as were received or possessed by the said Bankrupts, or either of them; and what Amount; and upon what occasion; and how disposed of;" whereas it ought to have been described thus: "The Account of the Receipts and Payments of *George Sharpe*, as one of the Executors of the said *George Russell*."

In consequence of these erroneous descriptions of the Schedule, the joint Estate of *George Sharpe* and his Partners appeared to be debtor in respect of their Receipts of the Partnership Property of *Russell, French & Nixon*, to the amount of 36,672 *l.* 13 *s.* 7 *d.*; whereas, if the Schedule had been headed properly, it would appear that the joint Estate of the Bankrupts was a Creditor against the Executors of *Russell* to the amount of 9,552 *l.* 4 *s.* 10 *d.* so that by the Mistake in the Schedules, the joint Estate of the Bankrupts was prejudiced to the amount of 46,224 *l.* 18 *s.* 5 *d.*

Under these circumstances, a Petition was presented by the Defendants, the Assignees of *George Sharpe & Sons*, supported by Affidavit, praying, that they might

1819.

FRENCH

v.

MYLES

and others.

be at liberty to produce, and carry in, before said *Master*, Evidence to show the Errors in the Schedules, and that the *Master* might be at liberty to receive such Evidence: and in case it should appear to the *Master* that the House of *George Sharpe & Sons* did not receive the Sums in the third Schedule stated to have been received by them, then that he might be directed to certify such his Opinion in the General Report to be made by him in pursuance of the Decree; and that in taking the Accounts by the Decree directed, the *Master* might be directed to admit as a Charge against the Bankrupts jointly, or against *George Sharpe*, as such Executor as aforesaid, separately, such Sums of Money only as upon the whole of the Evidence so to be produced and laid before him might in truth appear to have been respectively received by the said House of *George Sharpe & Sons* jointly, and by the said *George Sharpe*, as such Executor as aforesaid, separately; or that it might be ordered, that the Petitioners might be at liberty to have the Cause re-heard, and that in the mean time all further Proceedings under the Decree might be stayed; or that all such Proceedings might be stayed, until the Petitioners shall have exhibited their Supplemental Bill of Complaint against the Plaintiff and the several other Parties to the said Cause, for the purpose of establishing the truth of the matters and things before stated; or that such other or further Order might be made as might be just, for the purpose of correcting the erroneous and inaccurate Statements in the Schedules.

Mr. *Wilson*, and Mr. *J. Stephen*, in support of the Petition:—

Mr. Trower, *contra*:—

We do not admit the Error complained of. In this stage of the Cause the Answer cannot be altered; especially as one of the Persons who put in the Answer is dead. In *The East India Company v. Keighley (a)*, the Defendant was held to be bound by his Answer, though he admitted by mistake that he was Debtor in a large Sum, when the fact was he was a very considerable Creditor.

1819.

FRENCH

v.

MYLES
and others.

The VICE-CHANCELLOR:—

In the Case alluded to, the Debtor succeeded in inducing the *Master* to take the Account upon a different principle from what he had himself admitted to be just between him and the *East India Company*. In this Case there is a manifest Mistake in the Description of the Schedules. Where a Mistake is made in an Answer in Matter material to the Decree, the Court permits a Defendant to file a Supplemental Answer before the Decree. Here the Mistake is made in Matter not material to the Decree, but to the Account; and, acting by analogy, I must permit the Defendants to file Supplemental Schedules, with liberty to produce them before the *Master* upon the taking of the Accounts.

(a) *Ante*, p. 16.

1819.

7th November.

WILKINSON v. BEAL and others.

If Bill states a Defendant to be out of the Jurisdiction, and it is admitted by Infant Defendants, Proof of the Fact is still necessary. Relief may be had, under a general Prayer for Relief, in a Bill without any particular Prayer.

THE Bill stated, that one of the Defendants was out of the Jurisdiction. The Defendants admitted the fact; but some of them were Infants. No Proof was made that the Defendant was out of the Jurisdiction.

The VICE-CHANCELLOR:—

If I could act upon the admission of an Adult Defendant, I cannot act upon the admission of Infant Defendants.

Another question that arose, was, Whether a Prayer for general Relief was sufficient, without any Prayer for specific Relief? Upon which

The *Vice-Chancellor* observed, that, if a Party prays particular Relief, to which he is not entitled, he may nevertheless, under the Prayer for general Relief, have such Relief as he is entitled to upon the Case alleged and proved, and that he could not be in a worse situation, because he had not prayed particular Relief to which he was not entitled (a).

(a) See on this subject, 2d edit. and the Cases there *Madd. Prin. and Pract.* 171, noticed.

1819.

WILLS v. SAYERS.

8th November.

J. KILWICK, by his Will, bequeathed to the Defendant 750 *l.* Three per cent. Stock, upon Trust, to apply 600 *l.* Stock, and the Dividends, for the sole and separate use and benefit of his Daughter the Plaintiff *Mary Wills*, and her Receipts were to be sufficient discharges for the same; and 150 *l.* Stock, the residue of the said 750 *l.* Stock, for the use of his Grandchildren *M. Wills*, *O. K. Wills*, and *J. M. Wills*, at such times and in such manner as Plaintiff *M. Wills* should direct. And he bequeathed all his household and other Goods, Plate, Linen, China, Books and personal Estate, not thereinbefore disposed of, after payment of his Debts and Funeral and Testamentary Charges, unto the Plaintiff, *for her own use and benefit*; and appointed the Defendant Sole Executor of his Will.

Bequest to a married Woman of a Sum for her sole and separate use and benefit, &c. and afterwards a Bequest of the Residue for her own use and benefit; the Residue held, not to be separate Estate of the Wife.

The question was, Whether the words, “for her own use and benefit,” used in the Residuary Bequest, gave the Plaintiff a separate Estate?

Mr. *Bell*, and Mr. *Tinney*, for the Plaintiff:—

The Wife took a separate Estate. In *Lumb v. Milnes* (a), a Case is noticed of *Jones v. ———*, where, on a Bequest to a married Woman “for her own use,” it was held to pass a separate Estate to the Wife. In *Ex parte Ray* (b), a Case was cited by Sir *S. Romilly*,

(a) 5 Ves. 520.

(b) *Ante*, vol. i. 206.

1819.

WILLS

v.

SAYERS.

of *Johnes v. Lockart* (c), where a Legacy to a married Woman, "to her own use and benefit," was held to pass a separate Estate; and in that Case of *Ex parte Ray*, the late *Vice-Chancellor* says, "Taking the words 'sole use' by themselves, they must have the same meaning as 'separate use' (d)." In *Adamson v. Armistage* (e), the words, "for her own sole use and benefit," were held to pass a separate Estate; and the Case mentioned in *Lumb v. Milnes* is there relied upon. In *Kirk v. Paulin* (f), the Bequest was "to be at her disposal;" and in *Wagstaff v. Smith* (g), "to her own use, independent of her Husband;" and in both Cases it was held to be a separate Estate.

Mr. Heald, contra :—

The only decided Case that appears to be in point is that of *Johnes v. Lockart*, cited in *Ex parte Ray*. That went further than any Case went before. The present Case is, however, distinguishable; for in this Case a Bequest is first made of a Sum of Money "for the sole and separate use and benefit of the Plaintiff, her Receipts to be a sufficient discharge for the same;" and then follows the Bequest in question. The Testator shows that he knew the distinction between Property given to the Wife's separate use, and otherwise; and as he has not used the same words in the Bequest of the residue, it cannot be supposed that he meant to give her a separate Property in it.

(c) See this Case particularly stated by Mr. *Belt*, from the *Registrar's Book*, in his Note to *Lee v. Prieux*, 3 Bro. C. C. 383; by which it appears, that the Legacy in that Case was not held to pass as

separate Estate. I probably misunderstood Sir *Samuel*.

(d) *Ante*, vol. i. p. 207.

(e) *Coop. Rep.* 283.

(f) 7 *Vin. Abr.* 95, pl. 43.

(g) 9 *Ves.* 623.

The VICE-CHANCELLOR :—

In Equity, as at Law, a Gift to the Wife is a Gift to the Husband, who being bound to maintain the Wife, is entitled to her Property. A Court of Equity will however execute a Trust for the sole and separate use of the Wife, when the intention of the Donor to that effect is unequivocally declared. A Gift to the Wife for her use is no declaration of such an intention, and it is difficult to find any substantial distinction between a Gift to a Wife for her use, and a Gift to a Wife for her own use. But if such a distinction could prevail in another Case, it could not govern this Case. Here the Testator, as to the same Person with respect to another Gift, has appointed a Trustee, and expressly directed the application of it to her sole and separate use ; he knew, therefore, the technical form of excluding the right of the Husband ; and I cannot infer that, as to this Legacy, he intended what he has not expressed.

1819.

WILLS
v.
SAYERS.

STURGESS v. PEARSON.

G. SPRINGALL, by his Will, gave one-fifth of certain personal Property mentioned in his Will, in the following words : “ I give the Interest and Dividends of one other fifth part thereof to be paid to my Daughter *Anne Tatnall*, during her natural life ; and after her decease, I give the same to be equally di-

9th November.

Bequest to A. T. of Interest and Dividends of personal Property for life ; and then to be equally divided

amongst her three Children, or such of them as shall be living at her death.

The Children all died in the life-time of the Tenant for Life. Held, that they took vested Interests, transmissible to their Representatives.

1819.

STURGESS

v.

PEARSON.

vided amongst her three Children, or such of them as shall be living at her decease, the same to be paid to them at their age of twenty-one years."

Anne Tatnall had three Children, all of whom she survived; viz. a Daughter, who died under twenty-one, and unmarried; a Son, who attained twenty-one and died, leaving one Child, the Defendant, *S. A. Tatnall*; and the third a Daughter, *Elizabeth Brown*, who attained twenty-one, married and survived her husband, and died, leaving four Children, the Infant Plaintiffs, having made her Will, by which she bequeathed to the Plaintiff *Burgess*, her surviving Executor, all her Estate and Effects, for the benefit of her four Children.

The question was, Whether the Children of *Anne Tatnall* took vested Interests under the Will of *G. Springall*, though they died before their Mother; or whether, in the events, their Legacies were undisposed of?

On behalf of the Plaintiffs, it was contended they took vested Interests, and *Harrison v. Foreman* (a) was cited as in point; on the other hand it was urged, that the Legacies were only to take place if the Legatees were living at the death of *Anne Tatnall*; and that to hold the Plaintiffs entitled, would be in effect to strike out of the Will the words "such of them as shall be living at her decease."

The VICE-CHANCELLOR:—

If the Will had stopped with the Bequest of the Interest and Dividends to *A. Tatnall* for her life, and

(a) 5 Ves. 207; and see *Smither v. Willock*, 9 Ves. 234.

CASES IN CHANCERY.

413

1819

STURGESS
v.
PEARSON.

after her decease to be equally divided amongst her three Children, it is clear the Children would have taken vested Interests; but the Testator adds these words, "or such of them as shall be living at her decease;" and upon this expression the difficulty arises. If I were to indulge conjecture, I might think the Testator did not intend that the Children should take unless they survived their Mother; but where the expressions used are capable of a sensible effect, it is not safe to depart from them. The vested Interests first given by the Will, are, by the form of the expression, only defeated in case there shall be some or one, and not all of the Children living at the Mother's death; but that event did not happen, for there was not one Child living at the Mother's death. The alternative branch of the sentence, therefore, fails, and the primary expression, which gave vested Interests to the Children, takes effect. The Case of *Harrison v. Foreman* is in point.

JAMES ST. JOHN MASSEY, JOHN BRUCK- 16th November.
FIELD, and JOHN WILLIAMS - Plaintiffs; *A Person gra-*
and *tuitously acting*
HARMOND BANNER - - - Defendant. *in the Collection*
of Debts, &c.

BY Indenture, 16th March 1815, between *Mary* under a Trust
Banner, of *Liverpool*, of the first part, the several Per- *Deed, mixed the*
Money he re-

ceived with his own Money, by placing it in his Banker's hands in his own Name and upon his own general Account. The Bankers were in the habit of paying him an Interest of three per cent. upon Money in their hands. He informed the Trustees that the Money was in Bank, but did not state with whom; nor that it was mixed with his own Monies; nor that an Interest was to be paid upon it. The Bankers having failed, he is answerable for the Loss upon the Trust Money.

1819.

MASSEY
and others,
v.
BANNER.

sons whose Names were subscribed, of the second part, and the Plaintiffs of the third part; *Mary Banner* assigned all her Property to the Plaintiffs, upon Trust to sell the same; and after the payment of the Expense of the Deed and the Sale, to divide the residue amongst her Creditors, the Parties of the second part, who should execute the Deed, in equal proportions, according to their Debts, and to pay the Surplus (if any) to *Mary Banner*; and the Parties of the second part agreed to take the Assignment, in satisfaction of their Debts, and to release her from any Claim. The Deed contained other usual Covenants; and amongst others it was mutually covenanted, that if at the end of two months, the Plaintiffs or Claimants whose Debts should amount to 40 *l.* should refuse or omit to execute the Deed, that it should be at the option of *Mary Banner* to declare the Deed void or valid; but if she should keep to or abide by it, she should receive and take the Dividends or Shares of the outstanding Parties; and that *Mary Banner* should have power to enlarge the time limited for the eventual operation of the Deed for the space of one month after the date. The Deed was executed by the Plaintiffs, and the Creditors of *Mary Banner*, but not by all of them, until the 22d June 1816. The Deed was not executed by *Mary Banner* until the 2d August 1816. When the Deed was proposed, and afterwards when it was prepared, the Defendant, the Brother of *Mary Banner*, and an Accountant, offered, in order to save Expense, to collect and receive the Debts due to *Mary Banner*, and to sell and dispose of the Effects, and to make no charge for his trouble; which offer was accepted. He accordingly sold the Effects, and collected Debts, amounting in the whole, after payment of Expenses, to 674 *l.* 10 *s.* 3 *d.* which

was received between the months of March 1815 and July 1816; and which he mixed with his own Monies, by paying it in his own Name and to his own Account into his Bankers, *Aspinall & Co. of Liverpool*, who were at that time in good credit, and allowed Interest for Balances in their hands. The Defendant alleged that he had always left in his Bankers hands the full amount of the Trust Monies.

1819.

MASSEY
and others,
v.
BANNER.

The Defendant wrote to the Plaintiffs a Letter, dated *Liverpool*, 25th January 1816, stating, that the Dividend would be from 6s. 8d. to 7s.; that he was anxious the Creditors should receive it when they had all signed; saying also, as to the Trust Monies which he had collected, "It is in Bank here, and I will not feel answerable for it, though I am confident of its security: one of our Banks to-day suspends its Payments." No disapprobation was expressed at the lodgment of the Money. The Defendant was not informed that all the Creditors had signed until the 27th June 1816. On the 22d June 1816, the Bankers stopped Payment; and on the following 27th, a Commission issued against *Aspinall & Co.* and they were declared Bankrupts; at which time the Defendant had in their hands 964 l. 12 s. 11 d.

The Bill was filed by the Plaintiffs against the Defendant for an Account; and the question was, Whether, under the circumstances, the Defendant was bound to abide by the loss sustained by the failure of the Bankers?

Mr. Bell, and Mr. Rose, for the Plaintiffs:—

Though the Defendant acted gratuitously, he is liable for the Money received by him. The Money was not separated and ear-marked at the Bankers, but mixed

1819.

MASSEY
and others,
v.
BANNER.

with his own, and at his disposal; and the Bankers allowed Interest on the Balances in their hands. He says in the Letter of the 25th of January 1816, that the Money is in a Bank here, but does not say what Bank, or that he had mixed it with his own Monies, or that the Bankers paid Interest on Balances in their hands. In *Wren v. Kirton* (a), a Receiver was charged with a loss by the failure of the Banker, the Remittances being made to his own credit and use, and not to the separate account of the Trust. The present was not altogether a gratuitous Trust, for by placing the Money with his Bankers he gained a credit with them to that amount, and an allowance of Interest. The Defendant therefore is liable to the payment of this Money.

Mr. Agar, and Mr. Spence, for the Defendant:—

It would be extremely hard if the Defendant were decreed to pay this Money. The Bill is objectionable for want of Parties, as all the Creditors who signed the Deed ought to have been Parties; but we do not insist upon that objection. The Defendant did right for safety to place the Money in a Banker's hands. He informed the principal Trustee that it was in Bank at *Liverpool*, and he made no objection. It could not be distributed until all the Creditors signed, and before the day on which the Defendant received Notice that they had all signed, a Commission was issued against the Bankers. Miss *Banner* did not execute the Deed until the 2d August 1816, and until that time, which was after the failure of the Bank, no Person had a right to claim this Property. It is not a proper Case for a Court of

(a) 11 Ves. 377.

Equity. The Receipts are all on one side, and no Payments, nor is any obstruction occasioned by Miss Banner. *Dinwiddie v. Bayley* (b).

1819.

MASSEY
and others,
v.
BANNER.

The VICE-CHANCELLOR:—

I have held, that a Principal may in all cases file a Bill against an Agent, for an Account (c).

For the Defendant:—

In *Belchier v. Parsons* (d), where a Trustee paid Rents into a Banker's hands who failed, he was not held liable; and in *Knight v. Lord Plymouth* (e), a Receiver placed Monies in his Banker's hands to his own account, the Bankers failed, and Lord *Hardwicke* held, the Receiver was not liable. That Case is cited and approved by Lord *Rosslyn*, in *Rowth v. Howell* (f). In *Adams v. Claxton* (g), the Agent of a Trustee placed Money at his Bankers, mixing it with his own, and the Bankers failing, the Trustee was not considered as responsible. Here the Defendant was the Agent of the Trustee. That Case therefore is in point. The Defendant here acted gratuitously; he was not in Trade or liable to a Commission, on which stress is laid in *Wren v. Kirton* (h). In Cases of Bailment, a Bailee without reward is not responsible for a Loss, if he treats the Property in the same manner as his own. This Defendant took the same care of this Property as of his own. He had Money of his own to the amount of 300*l.* as well as this Money, in the Bankers hands, when they failed.

(b) 6 Ves. 136.

(e) 3 Atk. 480; and S. C.

(c) *Mackenzie v. Johnstone*
and others, *ante*, p. 373.

¹ Dick. 120; 3 Ves. 566.

(f) 3 Ves. 566.

(g) 6 Ves. 226.

(d) *Ambler*, 219.

(h) 11 Ves. 377.

1819.

MASSEY
and others,
v.
BANKER.

The Money remained untouched in the Bankers hands from the time it was paid in, and was always ready to be distributed whenever the Trust Deed should be executed by all the Creditors. The Interest allowed by the Bankers upon the Deposit was intended to be paid to the Trustees, to whom it belonged; and by whom it was recoverable. A distinguishing circumstance in this Case, is, the fact before-mentioned, of Notice being given to the acting Trustee that the Money was placed in a Bank at *Liverpool*, and that no objection was made to the Deposit.

The VICE CHANCELLOR :—

This may be a Case of individual hardship, but the Court is bound to proceed upon those principles which are deemed essential to the general interests of mankind. The Defendant being the gratuitous Agent of his Sister's Trustees, receives their Money, which he mixes with his own, by paying it into his own Bankers, and on his own general account. These Bankers were in the habit of paying him an Interest of three per cent. on the Monies in their hands. The Defendant says he meant to give Credit to the Trustees for their proportion of the Interest, but he never made any intimation to that effect. This Money is partly lost by the failure of the Bankers; and the question is, Whether the Defendant can throw this Loss upon the Trust. It is said to be the common habit of mankind to place all Monies for safe custody in the hands of a Banker, and that the Defendant was therefore well justified in placing these Monies in his Bankers hands, and thus constituting the Bankers the Agents of the Trust. I will not say what might have been the effect if he had

placed these Monies in the same Bankers hands with full Information of the Trust, and to a distinct Trust Account. It is sufficient to say, that here the Defendant gave no Notice to the Bankers that any part of the Monies in their hands was Trust Property. Both he and they treated the Monies as wholly his own, and the Bankers considered themselves as his Agents solely. It is said that he gave Notice to the Trustees that he had so invested the Money, and that they did not object to it, and are therefore to be considered as having authorized it. If he had given full Notice with whom he had invested it, and that he had mixed it with his own Monies, and that an Interest would be derived from it, there would have been great weight in that argument; but his Letter of the 26th January 1816, only states that "It is in Bank;" not stating with what Banker, or that it is mixed with his own Monies, or that a Profit is to be derived from it.

1819.
MASSEY
and others,
v.
BANNER.

The fact alleged by the Defendant, that he had always a Balance in his Bankers hands equal to the Trust Money, is, in my view of the case, immaterial. I consider the Trust Monies thus mixed with his own, and placed in his Bankers hands on his own general account, to be an employment of the Trust Money for his own advantage or his own credit, and that he is therefore responsible for the Loss which has resulted from it. I think this not a Case for Interest or Costs.

Note.—On an Appeal to the Lord-Chancellor, His Honor's Decision was affirmed.

Between PETER ISAAC THELLUSSON, afterwards
the Right Honourable PETER ISAAC Baron
RENDLESHAM, but since deceased, and others,
Plaintiffs ;

The Reverend MATTHEW WOODFORD, Clerk,
since deceased, and others - Defendants :

And,

Between the said MATTHEW WOODFORD and
another - - - - - Plaintiffs ;

The said PETER ISAAC THELLUSSON, afterwards
Lord RENDLESHAM, and others - Defendants :

And,

Between Sir RALPH JAMES WOODFORD, Sir
CHARLES WILLIAM FLINT, and JOHN
GEORGE WOODFORD - - - Plaintiffs ;

HENRY HOYLE ODDIE, an Infant, by his Guar-
dian - - - - - Defendant.

1819.

17th November.

*A Gift by
Testator in his
life-time to Le-
gatees, after a
Will giving
them Legacies,
held to be part
Satisfaction of
the Legacies,
upon Evidence
of the Intention
of the Testator
to that effect.*

THIS Cause came on upon Exceptions to the *Master's*
Report.

Peter Thellusson, by his Will, bequeathed to his
Executors 12,000 *l.* in Trust, as soon as conveniently
might be, after his decease, to lay out the same in the
Public Funds, or on Government Securities, and to
pay the Dividends and Produce thereof to his Daughter
Anne, during the time she remained unmarried; and
directed, that Interest at four per cent. should be paid
to her on the said sum of 12,000 *l.* until the same should
be invested, to be reckoned from the day of his de-

cease. And in case his Daughter should marry, with such Consent as therein mentioned, he directed, that, upon the treaty for such Marriage, the said 12,000*l.* or the Funds in which the same should then be invested, should be covenanted to be paid or transferred to Trustees, to be nominated and appointed in such Settlement by his Executors, upon such Trusts, Ends, Intents and Purposes as they should direct and appoint, but not otherwise.

And he thereby also gave to his Executors a further sum of 12,000*l.* upon the like Trusts, in favour of his Daughter *Augusta Charlotte*; and he gave all his real Estate, and all the residue of his personal Estate, unto *Woodford Stanley* and *E. I. A. Woodford*, upon certain Trusts therein mentioned; and he appointed them, together with his Wife *Anne Thellusson*, Executors and Executrix of his Will. The Testator died 21st July 1797.

By the Decree made 19th February 1801, on the Hearing of the two first-mentioned Causes, the Trusts of the Will were ordered to be carried into execution, and various Directions were given therein; and it was, among other things, referred to the *Master*, *Mr. Holford*, to appoint a new Trustee, in the place of *Stanley*; and to inquire, whether the Defendant *Thomas Champion Crespigny*, (who after the Testator's death had married the said *Augusta Charlotte Thellusson*,) had made any Settlement on his Wife, and the Issue of their Marriage, and whether the same was a proper Settlement.

By an Order, 24th July 1803, the said *Master* was

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

directed, *inter alia*, to state what Advertisements he had published for the Creditors of the Testator to come in before him and prove their Debts; and whether any, and what, Debts or Legacies of the said Testator remained unsatisfied; and whether any, and what, Claims of any such Debts or Legacies were then depending before him.

The *Master*, by his Report, 10th December 1803, after reciting, among other things, the Bequest of the said sums of 12,000 *l.* in favour of the said Testator's Daughters *Anne* and *Augusta Charlotte*, certified, that the said Testator afterwards made the following Entries in his Ledger; viz. "*Anne Thellusson*, 1796, September 8th, 1,000 *l.* East India Stock, I have put under her Name at the India House,—this is to be accounted as part of what I bequeathed to her by my Will, at 177 *l.*; 1 *l.* 5 *s.* Brokerage; 1,771 *l.* 5 *s.*—*Augusta Charlotte*, 1796, September 8th, 1,000 *l.* East India Stock, I have put under her Name at the India House,—this is to be accounted as part of what I bequeathed to her by my Will, at 177 *l.*; 1 *l.* 5 *s.* Brokerage; 1,771 *l.* 5 *s.*" And he found, that the said *Matthew Woodford* and *E. I. A. Woodford*, as such acting Executors, had set apart, out of the said Testator's personal Estate, the sum of 10,228 *l.* 15 *s.* for the use of the said *Anne Thellusson*, in order to make good the Legacy of 12,000 *l.* so given in Trust for her; computing the said East India Stock, so valued at 1,771 *l.* 5 *s.* in the said Ledger, as part of the said Legacy. And he found, that the said acting Executors had set apart, out of the said Testator's personal Estate, the sum of 10,228 *l.* 15 *s.* for the said *A. C. Crespigny*, in order to make good the Legacy of 12,000 *l.* so given in Trust

for her as aforesaid; computing the said 1,000 *l.* East India Stock, so valued at 1,771 *l.* 5*s.* in the said Ledger, as part of the said Legacy. And, after stating the several other Legacies bequeathed by the Will, the *Master* certified, that the several Legacies thereinbefore mentioned were all the Legacies bequeathed by the Will; and that it did not appear to him that any of them remained unsatisfied, except the Legacies of Annuities in the *French Funds*.

1819.
THELLUSSON
and others,
v.
WOODFORD
and others.

By an Order, 22d December 1803, it was, among other things, ordered, that the said Report should be confirmed.

Master Cox, who succeeded *Master Halford*, by his Report, 17th May 1805, after reciting the Settlement, bearing date 23d March 1798, made on the Marriage of *Anne Thellusson* with *T. C. Crespigny*, since deceased, and also reciting the Bequest of the said 12,000 *l.* in Trust for the said *A. C. Thellusson*, and that the said Testator afterwards transferred into her name 1,000 *l.* East India Stock, and in his Ledger opened an Account with her for the same, and charged her with the sum of 1,771 *l.* 5*s.* the price of such Stock; and at the foot of the said Account made a Memorandum in writing, that such Stock was to be considered part of what he bequeathed to her by his Will; and reciting that the said sum of 1,771 *l.* 5*s.* being deducted from the said Legacy of 12,000 *l.* had reduced the same to 10,228 *l.* 15*s.* and that *M. Woodford* and *E. I. A. Woodford* the acting Executors, had, in payment of the said sum of 10,228 *l.* 15*s.* and in satisfaction of said 12,000 *l.* after such a deduction as aforesaid, appropriated 20,821 *l.* 17*s.* 7*d.* Imperial Three per Cents. being of the value

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

of 10,228*l.* 15*s.* at the market price of that Stock, on the day that such appropriation was made; and reciting that 1,000*l.* East India Stock, and said 20,821*l.* 17*s.* 7*d.* Imperial Three per Cents. then formed the value or amount of the said Legacy of 12,000*l.*; and that such intended Marriage was consented to by the Persons therein named; and that it had been agreed, that said 1,000*l.* East India Stock, and 20,821*l.* 17*s.* 7*d.* Three per Cents. should be disposed of and settled in manner thereafter mentioned; it was witnessed, declared and agreed, that if such intended Marriage should take effect, the said 1,000*l.* East India Stock, and 20,821*l.* 17*s.* 7*d.* Three per Cents. should immediately after the solemnization thereof, be transferred into the names of Trustees therein named, upon the Trusts therein mentioned; the said *Master* certified, that upon consideration of the said Settlement, he conceived the same was a fit and proper Settlement upon the said *Augusta Charlotte Crespigny*, and the Issue of the said Marriage.

By an Order made June 1805, upon the Petition of the said *Augusta Charlotte Crespigny*, it was ordered, *inter alia*, that the said Report should be confirmed.

A Settlement was made 23d June 1801, on the Marriage of the said *Ann Lukin* with *William Lukin*, Esq. containing the like Recitals as in the Settlement of Mrs. *Crespigny*; and the said 1,000*l.* East India Stock, and 20,821*l.* 17*s.* 7*d.* Imperial Three per Cents. which the said acting Executors had appropriated in discharge of her said Legacy of 12,000*l.* was settled to the uses therein mentioned.

By an Order made 21st January 1818, upon the

Petition of *William Lukin* and *Anne* his Wife, and *A. C. Crespigny*, it was referred to *Master Cox* to inquire and state to the Court, whether the Petitioner *William Lukin*, in right of the said *Anne* his Wife, and the Petitioner *A. C. Crespigny*, were entitled to any and what Sum of Money, in addition to the sum of 10,228 *l.* 15 *s.* reported due to each of them, the said *Anne Lukin* and *A. C. Crespigny*, in respect of their respective Legacies of 12,000 *l.* given and bequeathed to, or in Trust for them, by the Will of the said Testator; and the said *Master* was to state specially his Opinion thereon to the Court.

1819.
THELLUSSON
and others,
v.
WOODFORD
and others.

Under this Order, the said Petitioners carried in a Claim before the said *Master*, whereby the said *William Lukin*, in right of the said *Anne* his Wife, and the said *A. C. Crespigny*, claimed to have the said two several sums of 1,771 *l.* 5 *s.* and 1,771 *l.* 5 *s.* paid to them over and above the Sums that they had respectively received for the Legacies of 12,000 *l.* each so bequeathed to them; and in support of their Claim, they laid the following Affidavit of the said *A. C. Crespigny* before the *Master*:—

“ Saith, That in or about the month of December 1796, *Peter Thellusson*, Esq. deceased, the Father of Deponent, and the Testator in the Pleadings named, being then at *Rendlesham*, in *Suffolk*, informed the Deponent and her Sister, *Anne Lukin*, then *Anne Thellusson*, another Daughter of the said Testator, that he had placed 1,000 *l.* East India Stock in each of their names; and from that time to the time aforesaid, Testator’s death, Deponent and her Sister received the Dividends upon the said respective sums of 1,000 *l.*

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

East India Stock so transferred to them, and at all times considered the said Stock to have been given to them by the said Testator, particularly as said Testator from that period discontinued making them an allowance, which he had previously made to them, for their own personal Expenditure and Pocket Money: and Deponent further saith, that neither at the time when said Testator informed her and her said Sister of his having placed the said sums of 1,000*l.* East India Stock in their respective names as aforesaid, nor at any time afterwards, did he ever inform Deponent, nor as Deponent believes, the said *Anne Lukin*, or in any manner intimated, that the same was intended as a part, or in lieu of the Provision made or intended to be made for Deponent, or the said *Anne Lukin*, by the Will of said Testator; but on the contrary, the same was always represented and spoken of by the said Testator, and was always considered by Deponent, and as she believes by the said *Anne Lukin*, as an absolute Gift from the said Testator to Deponent and said *Anne Lukin* respectively, and without any reference to any Provision made or intended to be made by his Will, for Deponent or said *Anne Lukin*, or either of them: and Deponent further saith, that she was never informed, nor had any knowledge of the Entries contained in the Ledger of the said Testator, relative to the said two sums of 1,000*l.* East India Stock, until after the death of said Testator."

The *Master*, Mr. *Cor*, by his Report of the 27th May 1819, made in pursuance of the Order of 21st January 1818, after stating the Bequests by the Will of the said Testator of the sum of 12,000*l.* for the benefit of each of his Daughters, the said *Anne Lukin* and

A. C. Crespigny, and stating so much of the said Decree as directed the then *Master*, *Mr. Holford*, to take an Account of the said Testator's Debts, and Funeral Expenses and Legacies ; and the said Order, 27th July 1803, for the late *Master* to state, whether any and what Debts or Legacies of the Testator remained unsatisfied ; and stating the said late *Master's* Report, dated 10th December 1803, as above recited, whereby he certified, that it did not appear to him that any of the said Legacies remained unsatisfied, except the Legacies of Annuities in the French Funds, and the said Order, dated 23d December 1803, confirming same ; the said *Master*, by his Report, certified, that the Ledger of the said Testator, mentioned or referred to by the said Report of the said late *Master*, had been produced before him, and it appeared to him that the said Book was in the nature of a Ledger, and indexed, commencing in the year 1793, after the Testator had retired from Business, and is all in his own hand-writing, and brought down to the 30th June 1797, being within three weeks of his death ; and contains an account of his pecuniary transactions in the way of Loans, Purchase and Sales of Stock, Discount, yearly Profits and Loss, D^r and C^t Account with sundry Persons, a Particular of the Payments for his House Expenses, and a general Statement of his Property, made up annually to the 31st December, the last Statement being to 31st December 1796 ; and that he had in the said Schedule to his said Report, set forth such of the Entries in the said Ledger, as seemed to him in anywise material to the present question ; and he found that the said Book or Ledger is referred to by the Will of the said Testator in manner following ; viz. " I further give and bequeath unto my said Son, *Peter*

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

Isaac Thellusson, the sum of 7,600 *l.* in order to make, with what I have before given to him, as it stands in my Books, the sum of 23,000 *l.*;"—and he found by the Evidence laid before him, that *Townley Ward*, late of *Henrietta-street, Covent-garden*, deceased, was some years previous to the death of the Testator employed by him to make his Will;—and he found, that in a Book kept by the said *Townley Ward*, which was found among his Books and Papers, and which had been produced before him, the said *Master*, and verified by the Affidavit of *Cliff Ashmore* aforesaid, who succeeded the said *Townley Ward* in his Business, there is an Entry, a Copy of which he had set forth in the Second Schedule to his said Report; which Entry is in the hand-writing of *James Moss*, deceased, who in the year 1797 was a Clerk to the said *Townley Ward*;—and he found, by the Affidavit of the said *Cliff Ashmore*, that there was found among the Drafts and Papers belonging to the said *Townley Ward*, a Paper-writing, intituled, "A Codicil to be annexed to, and taken as part of, the last Will and Testament of me the under-written *Peter Thellusson*;" of which Paper he had set forth a *fac simile* Copy in the Third Schedule to his Report;—and he found, that such intended Codicil was never, in fact, executed by the said Testator;—and he found, that, in the month of July 1797, the said Testator purchased an Estate at *Anotherby*, in the County of *York*, which appeared to him to be the Estate mentioned in the said Entry in the said Book kept by the said *Townley Ward*, for which the said Testator was then in treaty;—and he found, that the said Testator not having republished his Will, or executed any Codicil thereto, the said Estate at *Arnotherby* descended upon his eldest Son the said *Peter Isaac Thellusson*; and was

afterwards purchased of him, by the Trustees of the Will of the said Testator, for the purposes of such Will. And, upon consideration of the several Circumstances aforesaid, the said *Master* certified, that he did not see any sufficient reason to differ from the said Report of the said late *Master*, by which he found that the said Legacies to the said *Anne Thellusson* and *A. C. Crespigny* were satisfied in the manner mentioned in the said Report thereinbefore stated; and he therefore found, that the said *William Lukin*, in right of the said *Anne* his Wife, and the said *A. C. Crespigny*, are not entitled to any Sum of Money in addition to the sum of 10,228 *l.* 15*s.* reported due to the said *Anne Lukin* and *A. C. Crespigny*, in respect of their respective Legacies of 12,000 *l.* given and bequeathed to or in Trust for them by the said Will of said Testator *Peter Thellusson*.

1819.
THELLUSSON
and others,
v.
WOODFORD
and others.

The First Schedule referred to in the Master's Report.

Peter Isaac Thellusson :

1793, January 1st.

D^r

For so much I have given him on account of what he is to have of me, £. s. d.
or my Estate, after my death - - 15,300 — —

1796, April 1st.

For so much credited him out of the sum
of 7,500*l.* on the Bond of *Cha^s* - 100 — —
£. 15,400 — —

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

George Woodford Thellusson :

1793, January 1st.

Dr.

For so much I have given him on ac-			
count of what he is to have of me,	£.	s.	d.
or of my Estate, after my death	-	15,000	— —

1796, April 1st.

For so much credited him out of the
sum of 7,500*l.* on the Bond of
Cha - - - - -

400 — —

£. 15,400 — —

Charles Thellusson :

1793, January 1st.

For so much I have given him on ac-
count of what he is to have of me, or
my Estate, after my death - - 10,008 2 6

For so much I have lent him on his
Bond, for which he pays Interest, to
complete his Capital in the House of
Trade, 12,500 *l.*

N. B.—Same as opened as private
or particular Account.

1795, January 1st.

On account of my Son *Charles* marry-
ing Miss *Sabine Robarts*, I have given
him, which must be deducted from
the Bond he has given me - - -

5,000 — —

£. 15,008 2 6

CASES IN CHANCERY.

431

1796, April 1st.	Dr.			1819.
For so much credited him out of his	£.	s.	d.	
Bond, 390 l.; and Cash, 1 l. 17 s. 6 d.	391	17	6	THELLUSSON and others,
	£. 15,400	—	—	v. WOODFORD and others.

1793.

Maria, married to *Augustus Phipps*:
For so much I have given her on her
Marriage - - - - - £. 12,000. 0. 0.
Paid this in 4,000 l. Bank Stock.

6,825 l.	{	Placed the 31st Janu-
Three per Cent.		ary 1793, under the
Consols.		Names of the Hon.
		<i>William Hervey</i> , Ma- jor General, and <i>P. I.</i> <i>Thellusson</i> , as Trustees for <i>Maria</i> and her Children.

N. B.—Interest paid to *Augustus Phipps* to the day the Stocks have been paid for, and so have entirely settled this Account.

1796.

Anne Thellusson, my Daughter, 1,000 l.
East India Stock, I have put under
her Name at the East India House,—
this is to be accounted as part of what
I bequeath to her by my Will, at 177 l.
and 1 l. 5 s. Brokerage; 1,771 l. 5 s.

1797, April 5th.

Attending upon you this day, by appointment, in *Sherbourne-lane*, to consult upon your Will, and also upon your intended Codicil, when you postponed making the Codicil until you had completed the purchase of an Estate in *Yorkshire*, for which you was then in treaty - - - - £.o. 13. 4.

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

The Third Schedule referred to.

“ A Codicil to be annexed to, and taken as part of, the last Will and Testament of me the under-written *Peter Thellusson*.

“ Whereas I have, since the date and execution of my last Will and Testament, purchased for each of my two Daughters, *Anne* and *Augusta Charlotte*, the sum of 1,000 *l.* East India Stock, and which now stands in their Names in the Books kept for that purpose; and for each of which Capital Stock I paid the sum of 1,771 *l.* 5*s.* I do hereby order and direct, that the said sum of 1,771 *l.* 5*s.* shall be deducted from each of the Fortunes which I have by my said Will given to, or in Trust for, my said Daughters respectively.”

To this Report, the said *William Lukin* and Wife, and *Augusta Charlotte Crespigny*, filed the following Exception :—

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

" For that the said *Master* has, by his said Report, (after stating and referring by way of Evidence, amongst other things, to a Ledger kept by the Testator, *Peter Thellusson*, and to certain Entries therein contained, and set forth in the Schedule to his said Report such Entries in the said Ledger,) certified, that upon consideration of the several circumstances mentioned in his said Report, he did not see any sufficient reason to differ from the Report of the late *Master*, *Mr. Holford*, by which he found that the Legacies therein mentioned, to the said *Anne Lukin* and *Augusta Charlotte Crespigny*, were satisfied in manner mentioned in his Report thereinbefore stated; and that he therefore found that the said *William Lukin*, in right of the said *Anne* his Wife, and the said *Augusta Charlotte Crespigny*, are not entitled to any sum of Money in addition to the sum of 10,228 *l.* 15 *s.* reported due to them in respect of their said Legacy of 12,000 *l.* each, given or bequeathed to or in Trust for them by the Will of the said Testator, *Peter Thellusson*. Whereas the said *William Lukin* and *Anne* his Wife, and the said *Augusta Charlotte Crespigny*, are advised, and humbly insist, that the said Ledger referred to by the said *Master Cox* in his said Report, and the Entries therein contained, were not admissible Evidence against the Bequest contained in the said Will, in favour of the said *Anne Lukin* and *Augusta*, or for the purposes of establishing the Ademption of any part of such Bequests; and that the same ought not to have been received by the said *Master* in Evidence, or to have been set forth or referred to in his said Report; and that the said *Master* ought to have found, by his said Report, that the said *William Lukin* in right of the said *Anne* his Wife, and the said *Augusta Charlotte Crespigny*, were

respectively entitled to a sum of 1,771 *l.* 5 *s.* 2-piece, and to Interest thereon, after the rate of four per cent. *per annum*, as from the death of the said Testator, agreeable to the directions of his said Will, in addition to the said sum of 10,228 *l.* 15 *s.* so reported due to them in respect of their said Legacy of 12,000 *l.* each: in all which, &c."

1819.
TWELLUSSEN
and others,
v.
WOODFORD
and others.

Mr. Hart, and Mr. Phillimore, in support of the Exceptions:—

This is a new Case. The question is, Whether the Gift of the 1,000 *l.* East India Stock was *pro tanto* an Ademption of the Legacy of 12,000 *l.* We contend it was not. A Gift to operate as an Ademption of a Legacy, must, as said in *Grave v. Lord Salisbury* (a), be *ejusdem generis* as the Legacy; but here the Legacy by the Will is given on certain Conditions, and in case of Marriage is to be settled; but the Gift of the 1,000 *l.* East India Stock is absolute and unconditional. This Gift *prima facie* could not be construed as an Ademption of the Portion given by the Will. It is said, however, that by the Evidence adduced of the Testator's Ledger, and of an intended Codicil, the intention to adeem is clear, but is such Evidence admissible? It is contradicted by the Affidavit of the Daughter. The Evidence as to the intended Codicil is in favour of the Claim, for it shows, that the Testator thought at one time of declaring, by a Codicil, that this Gift should operate as an Ademption *pro tanto* of the Legacy; but leaving it unexecuted, shows also that he had abandoned that intention.

(a) 1 Bro. C. C. 425.

1819.

THELLUSSON
and others,
v.
WOODFORD
and others.

Mr. Bell, and Mr. Shadwell, *contra*:—

If there was any doubt whether the Gift operated as an Ademption, none can exist after reading of the Evidence. The Entry in the Ledger is decisive, to show that an Ademption *pro tanto* was intended; and it may be a question, whether that Ledger might not have been proved in the Ecclesiastical Court as part of the Testator's Will. To the amount of this 1,000 *l.* the Testator in his life-time exercised that discretion which, as to the remainder of the Legacy of 12,000 *l.* he deputed to his Executors after his death. The intended Codicil corroborates the proof by the Ledger, and it appears that he delayed the execution of the Codicil; not because he had changed his intention as to the 1,000 *l.* but because he was about to complete a Purchase in *Yorkshire*, which it would be necessary to notice in his Codicil.

The VICE-CHANCELLOR [after stating the Will]:—

If this had been simply a Gift of 1,000 *l.* India Stock, without more, an intention to adeem the Legacy *pro tanto* might not have been implied, the Gift being for the absolute benefit of the Legatee, and the Legacy being only of a qualified Interest. This, however, is not a case of implication, but of express declaration, on the part of the Testator, that the 1,000 *l.* East India Stock shall be considered as part satisfaction of his Legacy. It is argued, that his non-execution of the Codicil, by which it was to be declared that the Gift was in part satisfaction of the Legacy, proves that his intention fluctuated in that respect, and that he finally determined against it. I cannot entertain that opinion. The Codicil in this respect only followed the language

of the Ledger, and the delay of the execution is accounted for by the pending treaty for the *Yorkshire Estate*.

Exceptions overruled.

1819.

THELLUASON
and others,
v.
WOODFORD
and others.

CARRICK v. YOUNG.

A BILL was filed for a specific Performance of an Agreement by the Defendant, to take a Lease from the Plaintiff; and the Bill prayed a specific Performance, and nothing more.

The Defendant had been let into Possession; and the Plaintiff brought an Action for Use and Occupation. On a Reference to the *Master*, to ascertain whether the Plaintiff was proceeding at Law and in Equity for the same Matter, the *Master* reported in the Affirmative; and the Case now came on upon an Exception to the Report.

Mr. *Rose*, in support of the Exception:—

Mr. *Wingfield*, *contra*:—

The VICE-CHANCELLOR:—

The Plaintiff insists that he has a right to proceed here, to compel the Defendant to accept the Lease; and a right to proceed at Law, to compel the Defendant to pay the Rent, which would be due from him under the Lease. If this Court should decree a specific

17th November.

The Defendant agreed to take a Lease from the Plaintiff, and was let into Possession. The Plaintiff filed a Bill for a specific Performance of the Agreement, and brought an Action for Use and Occupation. It was referred to the Master, to see if the Defendant was proceeding at Law and in Equity for the same Matter. He reported in the Affirmative; and an Exception to his Report was overruled.

1819.

CARRICK

v.

YOUNG.

Performance of the Agreement, it will, of course, decree an Account of the Rent due under the Agreement; and the Action at Law is brought for the same object. I think, therefore, that the *Master* is right. If the Plaintiff was unwilling to wait for the Rent until the Decree, he might move here, that the Defendant should immediately pay that Rent which, in every event, would be due from him in respect of his Occupation.

Exception overruled.

17th November.

THOMPSON v. GRANT.

An Estate which a Testator holds as Mortgagee, will not pass under a general Devise of all Lands to Uses in strict Settlement; although the Testator at the making of his Will had obtained a Decree for an Account in a Bill of Foreclosure; for the Estate does not lose the quality of a Mortgage until the final Order of Foreclosure.

THIS was a Bill filed by a Trustee to establish a Will, and to carry the Trusts thereof into execution. The Cause now came on upon Exceptions to the *Master's* Report.

The Testator, *Alexander Donaldson*, being in possession, as Mortgagee, of two Estates in the Island of *Jamaica*, called *Brampton Bryan*, and *Bryan Castle*, filed a Bill in Chancery, in *England*, against *Richard Grant*, *J. Simpson*, and *L. H. Edwards*, for a Foreclosure of the Mortgage. By a Decree in this Cause, 6th July 1805, it was Ordered, that the *Master* should

A Devise of all Lands which the Testator may hold in Mortgage at his death, will not pass an Estate which was held in Mortgage by the Testator at the making of his Will; but as to which he had obtained a final Order of Foreclosure before his death.

1819.

THOMPSON
v.
GRANT.

take an Account of Principal, Interest and Costs; and the Decree then proceeded as follows:—"And, upon the Defendants, their or any or either of them, paying unto the Plaintiff what shall be remaining due to him for Principal and Interest, and Costs, together with what the Plaintiff shall pay for the Costs of the Defendants *Richard Grant* and *John Simpson*, within six months after the *Master* shall have made his Report of such Principal, Interest and Costs, at such time and place as the said *Master* shall appoint, it is Ordered, that the Plaintiff do re-convey and re-assign the Premises therein mentioned to be mortgaged, free and clear of and from all Incumbrances done by him, or any claiming by, from or under him; and deliver up all Deeds and Writings in his Custody or Power relating thereto, upon Oath, to the Defendants, or to such of them as shall redeem Plaintiff as aforesaid, or to whom they shall appoint; but in default of the Defendants, their or either of their paying unto the Plaintiff what shall be remaining due to him for Principal, Interest and Costs, and the Costs of the said Defendants *Richard Grant* and *John Simpson* as aforesaid, by the time aforesaid, the said Defendants are from thenceforth to stand absolutely debarred and foreclosed of and from all Right, Title, Interest and Equity of Redemption, of, in and to the said mortgaged Premises."

The *Master*, by his Report, 31st July 1806, made in pursuance of the said Decree, certified, that he found there would be due to the Plaintiff for Principal, Interest and Costs, on the 31st day of January 1807, the sum of 96,215 *l.* 13 *s.* 3 *d.* And he appointed the Defendants to pay the same to the Plaintiff, on the said 31st day of January 1807.

1819.

THOMPSON

v.

GRANT.

By an Order in the Cause, 5th February 1807, after stating, that upon Motion that day made on an Affidavit, that the Money was not paid on the day appointed, it was further stated, " And that therefore it was prayed, that the said Defendants may stand absolutely debarred and foreclosed of and from all Right, Title, Interest and Equity of Redemption, of, in and to the said mortgaged Premises; which upon hearing the said Decree, the said *Master's* Report, and the said Affidavit read, is ordered accordingly."

The Testator, by his Will, 14th December 1805, devised unto certain Trustees therein mentioned, all his Plantation, Lands and Tenements, whether Freehold or Leasehold, situate in the Island of *Jamaica*, and all other his real Estate and Chattels real in the said Island, to hold the same unto and to the use of the said Trustees, their Heirs, &c. upon the Trusts thereafter mentioned. And the said Testator devised to his said Trustees, their Heirs, &c. all the Estates which at the time of his decease should be vested in him upon any Trust, or by way of Mortgage, of which he had power to dispose by that his Will, upon the Trusts, and subject to the Equity of Redemption, which at the time of his decease should be subsisting or capable of taking effect therein respectively; but the Money to be secured on such Mortgages, he directed to be considered and taken as part of his personal Estate.

The Testator, *Alexander Donaldson*, died in March 1807, on his passage to *England*.

At the time of making his Will, he was seised of several Freehold Estates in *Jamaica*, which he had

purchased. He was also at that time in possession as Mortgagee in Fee of the before-mentioned Estates, called *Brampton Bryan* and *Bryan Castle*, in the said Island, and which he afterwards foreclosed, as before stated. His Executors and Trustees instituted the present Suit, for the purpose of taking the Accounts under the authority of the Court, and of selling the Estates, if necessary, under the same authority, for the benefit of the Creditors and Legatees.

1819.

THOMPSON

v.

GRANT.

By the Decree made on the Hearing of the Cause, 27th August 1817, it was referred to a *Master*, to take the usual Account of Debts and Legacies, and of the Testator's personal Estate, and of the Rents and Profits of his real Estates; and the *Master* was to inquire and state to the Court, whether the said Testator at his decease was seised of or entitled to any real Estates in *Jamaica*, which did not pass by his Will upon the Trusts thereof; and if he should so find, then it was ordered, that the said *Master* should ascertain what such Estates consisted of; and it was further ordered, that the said *Master* should inquire and state to the Court, whether the Provision made by the said Will, for Payment of the Testator's Debts out of the Rents and Profits and Produce of his real Estate, was an adequate Provision for, or capable of answering that purpose; and in case it should appear to the said *Master*, that the personal Estate of the said Testator come to the hands of the said Plaintiff, and which was not specifically bequeathed to be used and applied as attached to the said Plantations, was insufficient for the Payment of his Testamentary Expenses and Debts, and that the Trusts created by the said Testator for Payment of such Debts out of the annual Rents and

1819.

THOMPSON
v.
GRANT.

Profits of his Estates was not an adequate Provision for Payment of such Debts, the Parties were to be at liberty to lay before the said *Master* a Plan or Scheme for the sale of the Testator's real Estates and Plantations, together with the Slaves, Cattle, Stock, Implements and Utensils thereon, or of such parts thereof as he should find to be necessary for the purpose of paying such Debts ; and the said *Master* was to state the same, with his Opinion thereon, to the Court. But the Court did declare, that the direction thereby given, was to be without prejudice to any question arising between the Heir at Law of the said Testator, and the Devisees and Legatees named in his Will, whether any real Estates of the said Testator, not passing by his Will, ought or not to be primarily applied to make good the deficiency of the personal Estate, to pay the said Testator's Debts and Legacies, in exoneration of the real Estates devised by his Will

By an Order made on the occasion of the decease of the late Plaintiff, *Alexander Thompson*, it was directed, that the said original Suit of *Thompson v. Grant* should stand revived.

The *Master*, by his Report of this date, made in pursuance of the said Decree, and also in pursuance of the last-mentioned Order, found, that the said Testator, *Alexander Donaldson*, before the 14th of December 1805, the date of his said Will, had acquired by Purchase the several Freehold Plantations or Estates situate in the said Island of *Jamaica* thereafter mentioned ;—and the said *Master* found, that the said Testator was also at and for some time prior to the date of his said Will, seised, under and by virtue of certain Conveyances and

Assignments, of two other Plantations or Estates in the Parish of *Trelawney*, in the said Island, called *Brampton Bryan* and *Bryan Castle*, of which he, the said Testator, was in possession as Mortgagee in Fee for securing the re-payment of a large Sum of Money; and the said *Master* stated the Will of the said Testator, and the Proceedings on the Foreclosure Suit respecting the said last-mentioned Estate; and that he found, by an Affidavit of the said *Alexander Grant*, made in this Cause on the 4th day of May 1819, that said *Alexander Grant* at the time of the death of said Testator, and for sixteen years previously thereto, resided in the Island of *Jamaica*, and the neighbouring Island of *Saint Domingo*, and was well acquainted with the said *Alexander Donaldson*, and with the Plantations and other real Estates there possessed by him; that the said *Alexander Donaldson* was not, at his decease, to the knowledge or belief of him, the said *Alexander Grant*, seised or entitled to any other real Estates on the said Island of *Jamaica*, than as therein and in the said Report before mentioned; but that he was in possession of certain other Plantations or Estates called *Nonsuch* and *Unity*, and a Penn called the *Craule*, of which he was Mortgagee and Trustee. And therefore the said *Master* certified, that he was of Opinion, that all the real Estates in *Jamaica*, of which the said Testator, *Alexander Donaldson*, was seised, or to which he was entitled at the time of his decease, did pass by his Will.

1819.
THOMPSON
v.
GRANT.

To this Report the following Exception was taken.

“ For that the said *Master* hath, in and by his said Report, stated, that all the real Estates in *Jamaica*, of

1819.

THOMPSON
v.
GRANT.

which *Alexander Donaldson*, the Testator in the Pleadings in this Cause named, was seised, or to which he was entitled at the time of his decease, did pass by his Will; whereas the said *Master* ought to have certified, that the Estates called *Brampton Bryan* and *Bryan Castle*, in the said Report mentioned, and of which the said Testator, *Alexander Donaldson*, was in possession as Mortgagee in Fee at the time of making his said Will, did not pass by his said Will."

Mr. *Trower*, and Mr. *Longley*, in support of the Exceptions:—

That a new Estate is acquired by Foreclosure appears from *Wynn v. Lyttleton* (a), and *Strode v. Russell* (b), and in *Casborne v. Inglis* (c). In *Strode v. Russell*, it was unanimously agreed by the *Lord Chancellor*, *Master of the Rolls*, Lord Chief Justice *Trevor* and Mr. Justice *Tracey*, that Mortgages in Fee, although forfeited when the Will was made, do not pass by general Words; and that although the Mortgage is afterwards foreclosed, or a Release of the Equity of Redemption is obtained, yet that they go to the Heir at Law. A Mortgagee before Foreclosure cannot exercise any act of Ownership, and consequently he cannot devise the Land except as Mortgagee; a Lease by him does not bind the Mortgagor, nor can he cut Trees or commit Waste.

The only question, therefore, is, Whether the Foreclosure is to be considered as complete on the 6th July 1805, when the Decree was made; or whether it was complete only by non-payment of the Mortgage Money

(a) 1 Vern. 3.

(c) 1 Atk. 605.

(b) 2 Vern 621.

on the 31st January 1807, and the final Order on the 5th February 1807. If it was complete at the former period, the Estate passes under the Will; if complete only at the latter period, the Estate was acquired subsequent to the Will, and the Testator's Heir at Law takes, the Will not having been re-published. On the part of the Heir at Law, we submit the *Master's* Report is wrong, and that Foreclosure does not operate from the time of the first Decree; that Decree was merely interlocutory and prospective, depending upon the condition of payment or non-payment of the Mortgage Money; the Foreclosure was open until the 31st January 1807, the period fixed by the *Master* for the payment of the Mortgage Money; and until default of payment at that time, and the final Order on the 5th February 1807, the Testator was Mortgagee only. Upon that Order the Foreclosure took place, and the Testator acquired a new Estate, which he had not at the time of his Will.

1819.

THOMPSON
v.
GRANT.

In *Jones v. Kendrick*, mentioned by Lord *Hardwicke* in *Senhouse v. Earl(d)*, it was decided in the House of Lords, on an Appeal from Lord *King's* Decree, that a Plea of a Decree for Foreclosure, on a Bill for a Redemption, is insufficient, unless there has been a final Order. In *Perry v. Phillips(e)* it was held, that a final Decree upon a Sum ascertained is equal to a Judgment; but a mere Decree for an Account, with a direction for payment on the result of that Account, does not prevent the Executors paying a Judgment.

(d) 2 Ves. 450. It appears to Vesey, p. 384.
the Case was afterwards com- (e) 10 Ves. 34.
promised; Belt's Supplement

1819.

THOMPSON
v.
GRANT.

The words in the Will bequeathing the Property "which at the time of his decease should be vested upon any Trust, or by way of Mortgage," is ineffectual to pass a foreclosed Estate, because at the Testator's decease the Estate was not vested in him as Mortgagee; but by the final Order of the Court, made after the making of the Will, the Estate has become his own absolute Estate. The words of the Will are prospective, and can have no effect. Upon the whole, the Heir at Law seems clearly entitled to these Lands.

Mr. Hart, and Mr. Garratt, *contra* :—

Certainly the legal Estate in these mortgaged Lands passed by the Will, the legal Estate being in the Mortgagee after Forfeiture; and whether or not the equitable Interest passed, depends upon the intention of the Testator. This Testator has used very comprehensive words. *Primâ facie* the equitable Estate passes under this disposition, unless any purposes of the Devisor can be shown, inconsistent with such an intention. There are no circumstances in this Will which rebut the *primâ facie* intention. In *Noys v. Mordaunt* (f) it was held, that a Mortgagee may devise the Mortgage as real Estate, subject to the Equity as between the Mortgagor and Mortgagee. It may also be contended, that the final Order of Foreclosure relates back to the Decree *Nisi*, and has the effect of vesting the Estate from the time of the Decree *Nisi*. *Selwyn v. Selwyn* (g) is analogous, where it is held, in the Case of a Common Recovery, that the Judgment has relation to the Return.

(f) 2 Vern. 581.

(g) 2 Burr. 1131.

The VICE-CHANCELLOR:—

There is neither authority nor principle for stating that the Order of Foreclosure relates back to the Decree for the Account. At the time of the Will, therefore, the *Brampton Bryan* and *Bryan Castle* Estates were Mortgages, and cannot pass by the general Devise of all Lands in strict Settlement, because the Testator having no power to fetter these Estates with a strict Settlement, it is not to be intended that he meant to do it. A Testator may, if he pleases, give by his Will all his Interest in Mortgages to which he may be entitled at the time of his death, because a Mortgage is in substance a Chattel Interest. At the time of his death, the *Brampton Bryan* and *Bryan Castle* Estates were not Mortgages for Chattel Interests; they had become the Fee-simple Estates of the Testator by the Order of Foreclosure of the 5th February 1807, and could not pass by any antecedent Will.

Exception allowed.

1819.

THOMPSON
v.
GRANT.

The MAYOR, ALDERMAN, CAPITAL BURGESSES, and COMMONALTY of *Malden*, Plaintiffs;

and

GEORGE COATES - - - Defendant. 24th November.

THE Bill stated, that the Town of *Malden*, otherwise *Maldon*, is an ancient Borough Town; and the Burgesses of the same Borough, from time whereof the Memory of Man is not to the contrary, have been a

Bill held to lie in respect of Landcheap, claimed by Custom in the Borough of Malden in Essex.

1819.

Corporation of
MALDEN
v.
COATES.

Body Politic and Corporate in fact and in name; nevertheless, at divers times, until the 8th day of October, in the 50th year of the Reign of his present Majesty, by various names of Incorporation, to wit, by the name of Bailiffs and Burgesses of the Town of *Malden*, in the County of *Essex*; and by the name of the Burgesses of the same Town; and by the name of the Burgesses and Inhabitants of the same Town; and by the name of the Bailiffs, Aldermen, Head Burgesses and Commonalty of *Malden*, in the County of *Essex*; and, on the said 8th day of October, in the 50th year of the Reign of his present Majesty, and from thence hitherto, by the name of the Mayor, Alderman, Capital Burgesses, and Commonalty of *Malden*.

That within the said Borough Town of *Malden* there now are, and, from time whereof the Memory of Man is not to the contrary, have been a certain Haven called *Malden Hithe*, to which divers Ships and Carwells do usually come with sundry Commodities; and also two great Bridges, one of Stone called *Heighbridge*, and the other of Timber called *Fulbridge*, over both which Bridges there is, and, from time whereof the Memory of Man is not to the contrary, hath been a common and much frequented Highway, leading to the Town of *Colchester* in the said County, and to other Places in the said County and in the County of *Suffolk*, from divers parts in the Realm: which Haven and Bridges, Plaintiffs, and all their Predecessors, by such their several names of Incorporation aforesaid, have from time to time, whereof the Memory of Man is not to the contrary, repaired, sustained and amended, and have used and accustomed, and are bound and liable to repair, sus-

tain and amend, with all necessary Reparations and Amendments, to their great Costs and Charges.

1819.

Corporation of
MALDEN
v.
COATES.

That they, Plaintiffs and their aforesaid Predecessors, by their several names of Incorporation aforesaid, have been, and Plaintiffs are now, seised within their Demesne as of Fee, of and in a Manor or Lordship in *Malden* aforesaid, called or known by the name of the Manor of *Much Malden*; and that within the said Manor there are, and, from time whereof the Memory of Man is not to the contrary, have been divers Customs, Liberties and Privileges belonging to the said Manor, and, amongst others, one Custom called a *Landcheap*; that is, (to wit,) that every Person purchasing any Estate of Inheritance of or in any Freehold Lands or Tenements holden of the said Manor, should pay, and hath, by all the time aforesaid, used to pay, to the Lords of the said Manor or Lordship for the time being, for every Mark of Money, being the Price of every such Purchase, for such Lands and Tenements so holden and purchased, Ten Pence of lawful Money of *England*.

That within the Residue of the said Borough, over and besides the said Manor, there is, and, from time whereof the Memory of Man is not to the contrary, hath been the like Custom, called a *Landcheap*, that every Person purchasing any Estate of Inheritance of or in any Freehold Lands or Tenements within the said Residue of the Borough, or the Liberties thereof, ought to pay, and by all the time aforesaid have used to pay, to the Chamberlain of the said Borough for the time being, as Collectors thereof, to the use of the said Corporation, the like sum of Ten Pence for every Mark of the Price of the same Purchase, of whomsoever the

1819.

Corporation of
MALDEN
v.
COATES.

said Lands and Tenements so purchased were holden ; and for Non-payment thereof, the said Corporation, by their Ministers and Officers, have, by all the time aforesaid, used to distrain for the same the Lands and Tenements so purchased : by the benefit of which Custom, Plaintiffs and their Predecessors have been the better enabled to maintain the Haven and Bridges aforesaid, and to perform other Duties and Services to his Majesty and his Progenitors for the Weal public of this Realm.

That some time since said Defendant purchased of *John Smith* of *Malden*, in the County of *Essex*, Currier ; *Mary Tibbald*, of the same place, Widow ; and *Sarah Raymond*, of the same place, Widow ; and of *James Smith*, of the same place, Carter ; some or one of them, or of some other Persons or Person, a certain Field, Close, or parcel of Pasture Land, commonly called or known by the name of *Tyler's Hill*, situate, lying and being in the Parishes of *All Saints* and *Saint Peters*, in *Malden* aforesaid, or one of them, not holden of the said Manor of *Much Malden*, and within the said Borough of *Malden*, and the Liberties thereof : and he (said *George Coates*) purchased the Fee-simple and Inheritance of the said Field, Close, piece or parcel of Pasture Land, at or for the price or sum of 430 *l.* 10 *s.* or some large Sum of Money, whereby there grew due from Defendant, to be paid unto Plaintiffs, by the Custom of the said Borough, the sum of 26 *l.* 18 *s.* 1 $\frac{1}{2}$ *d.* for *Landcheap*, after the Rate and according to the Custom aforesaid of Ten Pence for every Mark which said Field, Close, piece or parcel of Land, and Premises, are Freehold Lands and Tenements, and liable to the said Custom of *Landcheap* ; and which hath in fact, in all former times, and from time whereof the Memory of

Man is not to the contrary, been paid, and still is payable, on the Purchase thereof in manner aforesaid. But the certainty of the said Purchase so made by, said Defendant as aforesaid; for what Estate it was made; and whether it was made by the said Defendant in his own Name, or in the Name of some other of his Friends in Trust for him, and to his use; and what Sums of Money he hath paid, or agreed to pay, for the same, Plaintiffs know not with certainty, nor have any means to come to the certain knowledge thereof, and so have no adequate remedy, neither by Distress, according to the Custom, or otherwise by the ordinary course of Common Law, to recover such Sum of Money as is due unto them by the Custom aforesaid, upon the Purchase aforesaid; which said Defendant well perceiving, and seeking as much as in him lieth to destroy the said Custom of *Landcheap*, doth utterly deny to pay.

1819.
Corporation of
MALDEN
v.
COATES.

The Prayer of the Bill was, That the said Custom of *Landcheap* might be established by the Order and Decree of this Court; and that an Account might be decreed to be taken, of what was due from said Defendant to Plaintiffs for *Landcheap*, in respect of his said Purchase; and that said Defendant might be decreed to pay the same to Plaintiffs, with Interest, from the time when the same became due and payable.

The Defendant put in a general Demurrer, for want of Equity.

Mr. *Bell*, and Mr. *Richards*, in support of the Demurrer :—

The remedy for the Plaintiffs is at Law, by means

1819.

Corporation of
MALDEN
v.
COATES.

of a Distress. There is no reason for coming here. If indeed a Discovery was necessary, they might have filed a Bill merely for that purpose, but could not pray Relief. The Custom stated in the Bill is not good; no sufficient Consideration for it being stated: neither do they state that the Custom is disputed. If a Bill is filed to establish a Modus, it must state that the Modus is disputed: the Corporation cannot prescribe as for a personal Duty, payable to them as Corporators. They insist upon a double Custom, the Custom of the Manor of *Much Malden*, and the Custom as to the Residue of the Borough; but this Bill seeks only *Landcheap* in respect of Lands purchased in the Residue of the Borough, so that they have no right to call for an Establishment of the Custom of *Much Malden*, as to which the Defendant is not shown to have any Intent to dispute it.

Mr. Trower, and Mr. Garratt, in support of the Bill:—

The Custom is a good one, and has been determined to be so. It is mentioned in *Tanner's Dictionary*, in *Cowell's Interpreter* (a), and in *Termes de Ley*. It is thus described in *Termes de Ley*: “Landcheap is a Pay-

(a) 420. *Cowell*, in his *Interpreter*, thus describes *Landcheap*: “An ancient customary Payment, paid either in Cattle or Money, at every alienation of Land lying in some peculiar Manor, or the Liberty of some Borough; as at *Malden*, in *Essex*, there is yet a Custom, that for certain

Houses and Lands sold within that Borough, 10*d.* in every Mark of the Purchase Money shall be paid to the Town; and this Custom they claim, *inter alia*, by a Grant made to the Town by the *Bishop of London*, anno 5 Hen. 4.”

Tanner thus explains the Custom of *Landcheap*: “Land-

ment of 10*d.* on the Purchase Money for every Mark thereof, for all Lands within the Borough of *Malden*, in *Essex*, by Prescription. It was determined to be a good Custom in *Brychwood v. Nutt (b)*, and *Bagby* and another *v. Bond (c)*; and in *Vinkestane v. Elden (d)*, Lord Ch. J. *Holt* refers to those Cases, as establishing the Custom. It is true, that Proceedings might have been had at Law, but this Court has Jurisdiction. A Bill lies here to establish a Custom, and for Duties and Tolls due by Custom; and it is upon the principle upon which Bills of Peace are permitted; for where a Person has a Right which may be controverted by various Persons at different times and by different Actions, the Court will prevent a multiplicity of Suits, by directing an Issue to determine the Rights, and ultimately an Injunction, as in the *Mayor of York v. Pilkington (e)*, *Lord Tenham v. Herbert (f)*, *Conyers v. Lord Aberga-venny (g)*, *Couper v. Clerk (h)*. There are also Cases where Bills of Peace have been brought, though there

1819.
Corporation of
MALDEN
v.
COATES.

cheape, (*Saxon*, Landcheape, from to buy and sell,) a certain ancient customary Fine, paid either in Money or Cattle, at every alienation of Land lying within some Manor, or within the Liberty of some Borough; as at *Malden*, in *Essex*, there is yet a Custom claimed by the same name; viz. that for certain Houses and Lands sold within that Borough, 10*d.* in every Mark of the Purchase Money shall be paid to the Town; which Custom of Land-

cheape is claimed by a Grant (*inter alia*) made to the Town by the Bishop of London, anno 5th Hen. 4. The word is found in *Spel. de Concil.* vol. i. f. 502."

(b) 3 Keb. 281.

(c) Ibid. 532.

(d) 1 Lord Raym. 386.

(e) 1 Atk. 282.

(f) 2 Atk. 483.

(g) 1 Atk. 285.

(h) 3 P. Wms. 156; Bunb. 41.

1619.
 Corporation of
 MALDEN
 v.
 COATES.

has been a general Right claimed by the Plaintiff, and yet no privity between the Plaintiffs and Defendant, nor any general Right on the part of the Defendant, and where many more might be concerned than those brought before the Court; such are Bills for Duties, as in the Case of the *City of London v. Perkins*, in the House of Lords (i). They cited also *Melbourne v. Fisher*, *Corporation of Carlisle v. Wilson* (k), and *Corporation of Reading v. Winckworth* (l).

The Charter granted to the Borough of *Malden* was renewed by his present Majesty (m), and the present Bill is filed to assert the Ancient Rights of the Borough.

The VICE-CHANCELLOR:—

The points which have been argued were much considered in a late Case before me, of the *Duke of Norfolk v. Myers* (n). I will refer back to my Notes of that Case before I decide this. I cannot upon this Bill establish the Custom as to the Manor of *Much Malden*, because no Claim is made upon the Defendant in respect of that Manor, and there is no one before the Court who is interested in resisting the alleged Custom. With respect to the Lands constituting part of the residue of the Borough, it appears to me that the Custom is well laid. My only doubt is, whether a Bill will lie here before the Custom is established at Law.

On the next day, 25th November, the *Vice-Chancellor* stated, that in *Lord Tenham v. Herbert* (o), Lord Hard-

(i) 1 Harr. Ch. Pract. 27.

(k) 13 Ves. 277.

(l) 5 Price, 473.

(m) 50 Geo. 3.

(n) *Ante*, p. 83.

(o) 2 Atk. 483.

wicke had held, that such a Bill will lie before the Right is tried at Law, where the Parties are numerous ; but that where such a Right is in dispute between two Lords of Manors, it must first be tried at Law.

1819.
Corporation of
MALDEN
v.
COATES.

Demurrer overruled.

CHARLES LORD, Clerk - - - Plaintiff;
and
SAMUEL GODFREY, WILLIAM YOUNG, MARIA
ROWAND, and CHARLES ROWAND,
Defendants.

25th November.

CHARLES HASSELLS, by his Will, 30th January 1818, after directing all his Debts, Funeral Expenses and Testamentary Charges to be paid out of the Stock and Funds standing in his Name in the Books of the Governor and Company of the Bank of *England*, gave to the Defendants, *Samuel Godfrey* and *William Young*, and the Survivor of them, his Executors and Administrators, all the rest, residue and remainder of the Stocks *Testator bequeathed (subject to his Debts, &c.) all the Stocks and Funds standing in his Name, to Trustees, to pay the Interest and Dividends to Testator's Wife for life, for her sole and separate use, &c. and after her death, &c. to C. L.; and empowered his Trustees, at their discretion, to change the Stock as often as to them should seem fit and proper. At the Testator's death, there were Long Annuities standing in his name, producing 365 l. per annum. C. L. filed a Bill for an Account, and to have the Long Annuities sold, and Three per cent. Consols bought instead, as the Long Annuities were a perishable Fund. Held, that the Executors could not change the Fund, so as to alter the relative Interests of the Legatees.*

1819.

LORD

v.

GODFREY

and others.

and Funds then standing in his, the Testator's Name, or which might be standing in his Name at his decease, in the Books of the Governor and Company of the Bank of *England*, upon Trust, to pay the Interest and Dividends thereof, as and when the same should be received at the Bank of *England*, to or to the sole use of his, the Testator's, Wife *Maria*, for and during the term of her natural life, not subject to the Debts or Control of any future Husband; and directed that she should not sell or dispose of her Interest, or alien the same; and from and immediately after the decease of his said Wife, or such Alienation or Sale, upon Trust, that the said *Samuel Godfrey* and *William Young*, and the Survivor of them, his Executors and Administrators, should with all convenient speed, assign and transfer all the said Stock, Funds and Premises, and all Interest and Dividends to accrue and grow due and payable in respect thereof; unto and to the use of Plaintiff, by the description of his, the Testator's, Nephew, the Reverend *Charles Lord*, of, &c. his Executors, Administrators and Assigns respectively: and the Testator directed, that it should and might be lawful to and for the said Trustees, or the Survivor of them, or the Executors or Administrators of such Survivor, at any time or times, at their or his discretion, to transfer all or any part of his said Stock or Funds from and out of the Stock or Funds in which the same might be invested at the time of his decease, to any other Parliamentary or Public Funds of *Great Britain* then in being, or thereafter to be duly made and created; and again to alter, vary and transfer all or any of the said Stock and Funds as often as to them should seem fit and proper, such several Trust Monies, Stock, Funds and Securities to be holden

upon the same Trusts, Provisoos and Conditions in that his Will declared, of and concerning the Stock, Funds and Premises thereby bequeathed; and the Testator, after giving the Residue of his personal Estate to his said Wife for her sole Use, appointed her, and the said *Samuel Godfrey*, and *William Young*, Executrix and Executors of his Will.

1819.
—
LORD
v.
GODFREY
and others.

The Testator died on the 7th February 1818. At the time of his death there was standing in his Name Long Annuities, producing 365 *l. per annum*, which were afterwards transferred into the Names of the Defendants, *Godfrey* and *Young*; and a part of the same was sold for the payment of Debts, &c.

The Testator's Widow afterwards married the Defendant *Roward*.

The Bill, stating the foregoing facts, also stated, that the Stocks and Funds, so standing in the Name of *Godfrey* and *Young*, upon the Trusts of the Will, were Annuities daily decreasing in Value; and which, in all probability, would run out or be expended, and become of no Value by such time as the Plaintiff should, under the Trusts of the Will, become entitled in possession; and the Plaintiff would thereby be wholly deprived of all benefit under the Will, if the Court should not direct a Sale thereof, inasmuch as the said Annuities had but a few years to continue; and that the Defendant, Mrs. *Roward*, was of the age of twenty-five years or thereabouts, and a Person of good and healthy Constitution, and likely to live beyond the period when such Annuities would cease. The *Prayer* of the Bill was for an Account, and that the Residue of the Funds

1819.

LORD

v.

GODFREY

and others.

and Stock, after payment of the Testator's Debts, &c. might be ascertained and transferred into the Name of the *Accountant General*; and that, when so transferred, the same might either be sold with the *Accountant General's* Privity, and the Money to arise by such Sale laid out in the Purchase of Three per cent. Consols, and the Trusts declared; or, if the Court should not think fit to direct such Sale, that the Trusts of the Stock and Funds might be declared.

The Executors by their Answer submitted to act as the Court should direct.

Mr. *Horne*, and Mr. *Beames*, for the Plaintiffs, contended, that the *Long Annuities* being a perishable Fund, the same ought to be transferred into Three per cent. Consols; and that the Court ought to make a direction for that purpose; and that thereby the Testator's intention, to benefit all the Legatees, would be effected.

Mr. *Matthews*, for the Defendants, the Executors:—

The VICE-CHANCELLOR:—

The Testator, in the first place, gives to his Wife a Life Interest in all the Funds which were standing in his Name at the time of his death, and consequently, an express Life Interest in these Long Annuities.

He afterwards gives to his Trustees the common and general authority, to alter and vary the Securities from time to time. It would, I think, be too much to intend, that the Testator meant to authorize the Trustees, at their pleasure, to diminish the Gift he had before

made to his Wife. Such a Power is given to Trustees with a view to the Security of the Property, and not with a view to vary or affect the relative Rights of the Legatees.

1819.

LORD

v.

GODFREY
and others.

Ex parte BAGE and others, *in re* WICKSTEAD.

29th November.

THIS was a Petition by the Assignees, three in number, of a Bankrupt, stating, that the Bankrupt was entitled to certain Freehold Estates, of which a Bargain and Sale, under the Commission, was made by the Commissioners to the Petitioners as Assignees; that they had twice put up the Estates to be sold in several Lots, but no adequate Bidding was made; that afterwards, they sold all except one Lot, for which only 350*l.* was offered, but that the Petitioner *William Hazeldine*, one of the Assignees, was desirous of becoming the Purchaser of that Lot for 380*l.*: the Petition therefore prayed, that the Petitioner *Hazeldine* might be allowed to become the Purchaser of that Lot for 380*l.* The facts in the Petition were verified by an Affidavit of *William Bage*, the Petitioner, one of the Assignees.

Assignee, desirous of becoming a Purchaser of the Estate of the Bankrupt, must first obtain the Consent of the Creditors; and then petition, and serve the other Assignees, and also the Bankrupt, with the Petition.

Mr. Cooper, in support of the Petition, cited *Whelpdale v. Cookson* (a), the Case of a Trustee who had purchased, approved in *Campbell v. Walker* (b); and a Case, where a Solicitor under a Bankruptcy was allowed

(a) 1 Ves. 9.

(b) 5 Ves. 682.

1819.

Ex parte
BAGE
and others,
in re
WICKSTEAD.

to be a Purchaser. *Maychill v. Bray*, 1811, MS. cited in *Whitmarsh's Bankrupt Law*, p. 150.

The VICE-CHANCELLOR :—

The Court is bound to act with great caution before it gives an Assignee an Authority to purchase a part of the Bankrupt's Property. I will make no such Order, unless the Consent of the Creditors, at a Meeting called for that purpose, has been first obtained ; and then let the Assignee present a Petition by himself ; and let it be served upon the other Assignees and the Bankrupt.

FARLOW v. WEILDON.

29th November.

Biddings will not be opened, unless an Advance is offered of 40 l.

MR. SUGDEN moved for Leave to open Biddings for a Lot, and offered an advance of 30 l.

The VICE-CHANCELLOR :—

The advance offered is not sufficient. In ordinary Cases, where the Parties in the Cause are few, the Expense of opening Biddings is from 20 l. to 25 l. which is occasioned by the Advertisements in the Gazette and other Papers, fresh Particulars of Sale, the Sale, and the Costs of the Motion. In *Gilbert v. Wetherell*, 13th December 1817, the Lord Chancellor refused to open Biddings unless 40 l. was offered in advance: and that seems a good general Rule.

Mr. *Sugden* then offered an advance of 40 *l.* and an Order was accordingly made, giving Leave to open the Biddings (*a*).

1819.
FARLOW
v.
WEILDON.

(*a*) When Biddings are opened, the Person who opens them pays all the Costs of the former Purchaser; and, I am informed, that he has been

allowed the Costs of an Agent, who travelled a considerable distance for the purpose of bidding for his Principal.

ANONYMOUS.

MR. *BLAKE* moved, on behalf of the Petitioner, who was an Infant when the Suit was instituted in his Name by a *Prochein Amy*, that the Bill might be dismissed, with Costs to be paid by the *Prochein Amy*.

6th December.
A Bill, filed in the name of an Infant, may be dismissed by him when he comes of age; but he cannot make the Prochein Amy pay the Costs, unless it be established that the Bill was improperly filed.

Mr. *Treslove, contra*, insisted, that as no ground was laid for making the *Prochein Amy* pay the Costs, the Plaintiff must pay them himself.

The VICE-CHANCELLOR:—

Where a Bill is filed in the Name of an Infant, he may abandon the Suit when he comes of age; but he cannot compel the *Prochein Amy* to pay the Costs, unless it be established that the Bill was improperly filed. Let the Bill be dismissed, upon the late Infant Plaintiff giving an undertaking to pay the Costs, and the Costs of the next Friend.

1819.

15th December.

CURTIS v. RIPPON.

An Infant, of the age of 17, appoints a Guardian by Deed : A PETITION was presented for the Appointment of a Guardian to an Infant.

this does not preclude an Application to the Court to appoint a Guardian. Mr. *Heald* opposed it, saying, that the Infant was of the age of seventeen, and had by Deed appointed a Guardian for himself; by which, he submitted, the Court was precluded from appointing one; but he added, he could find no Decision to that effect.

The VICE-CHANCELLOR :—

Such an Appointment cannot supersede the Duty and Authority of this Court. Let there be a Reference to the *Master* to consider of a proper Person to act as Guardian.

ANONYMOUS.

6th December. AN Order had been made for the payment of a Sum of Money, but although the Defendant had been called upon seven times he could not be found, so as to be personally served with the Order.

Mr. *Shadwell* now, on an Affidavit, moved for an Order for Payment of the Money within four days; and that Service of this Order on the Defendant's Clerk in Court, might be deemed good Service. The *Vice-Chancellor* made the Order.

ANONYMOUS.

1819.

6th December.

MR. Parker moved, that the Examiner might be directed to wait upon the Witness to take his Examination, upon an Affidavit of the Incapacity of the Witness to attend the Examination. The *Vice-Chancellor* made the Order.

SHAKEL v. Duke of MARLBOROUGH.

MR. PARKER moved for a Receiver, under the following circumstances: The Defendant, on an advance of Money, agreed to execute a Mortgage of certain Lands, but did not perform his Agreement; and there was an Arrear of Interest due on the Money advanced. The Bill was filed for a specific Performance of the Agreement, and prayed for a Receiver.

Same date.

The VICE-CHANCELLOR:—

Take your Motion. If the Defendant had performed his Agreement, you would have been entitled to bring an Ejectment.

1819.

6th December.

ALLEN v. KILBRE.

On a separate Commission against one Partner, the Assignees took possession of the Partnership Property, and were about to sell it. Injunction, on filing of Bill and Affidavit, granted to restrain the Sale.

MR. SPENCE moved for an *Ex parte* Injunction, on a Bill filed and Affidavit, at the instance of a solvent Partner, to restrain the Assignees of a Bankrupt from selling the joint Effects. The Bill contained no offer to pay the joint Creditors, but offered to account for the Share of the Bankrupt Partner. Mr. Spence was not aware of any Case expressly in point, but cited what Lord Eldon says in *Dutton v. Morrison* (a), on a question of Attachment.

The VICE-CHANCELLOR :—

The Bankruptcy determines the Partnership. The Assignees are entitled to the Interest of the Bankrupt in the joint Estate, but they do not become Partners, and have no right to exclude the solvent Partners from the possession. Take the Injunction ; but let the Assignees be immediately served with notice of this Order, that such measures may be taken with respect to the joint Estate, as the justice of the Case may require.

(a) 17 Ves. 211. S. C. ; 1 Rose, 213.

14th December.

GREY v. DICKENSON.

All Applications to rectify a Decree, must be by Petition.

MR. BELT moved to rectify an Omission in a Decree ; but the *Vice-Chancellor* stated, it was a general rule, that Applications of that nature should be made by Petition, in order that the Court might have before it all the Proceedings in the Cause.

1819.

LOWNDES v. ROBERTSON and others.

14th December.

THE point in this Case was, Whether the Defendants, who were entitled to a Security for Costs, had each of them a right to have a Bond for 40 l.; or whether the Plaintiff was only bound to give one Bond to that Amount.

Where a Plaintiff is bound to give Security for Costs, each Defendant, employing a separate Clerk in Court, is entitled to a separate Bond for 40 l.; but the Plaintiff is only bound to pay one 40 l.

Mr. Koe insisted, that separate Bonds ought to be given to each Defendant; but observed, that although Lord *Thurlow* had decided that each Defendant was entitled to a Security for his Costs, he had not said whether it was to be by separate Bonds.

Mr. *Lovat*, *contra* :—

The Bond, in the present Case, was drawn according to a precedent in *Turner v. Venables*, Pract. (a); but if each Defendant is entitled to a separate Bond for 40 l. that form is not right. The point does not appear to be settled.

The VICE-CHANCELLOR :—

I will inquire into the Practice.

On this day, the *Vice-Chancellor* said, I have inquired into the Practice; and I find, that although it is usual to give separate Bonds to each Defendant who appears by a separate Clerk in Court, they all form a Security for one sum of 40 l. only. Originally, when

1820.

17th July.

(a) 1 Vol. p. 332. 2d edition.

1820.

LOWNDES

v.

ROBERTSON
and others.

there were several Defendants, only one Bond for 40*l*. was given, which was deposited with one of the Six Clerks on behalf of all Parties. Afterwards, the Bond was deposited, not with a Six Clerk, but with a Clerk in Court; and as the Clerk in Court of one Party had no more right to hold the Bond than the Clerk in Court of another Party, it became the Practice for every Clerk in Court for a Defendant, to call for a separate Bond. It would seem to be desirable that the old Practice should be restored, and I will take an opportunity to call the attention of the *Lord Chancellor* to this subject.

1819.

THORPE v. FREER.

15th December.

If a Purchaser makes frivolous Objections to a Title, he pays the Costs; but not if he makes a fair Objection, or insists on Enquiry as to a material Fact, respecting which there is a fair Doubt.

A DECREE was made for a specific Performance against a Purchaser who had made an objection to the Title; and had also suggested a doubt, whether the Bankrupt, whom the Plaintiff represented, had not executed a Power of Appointment previous to his Bankruptcy; and the question was, as to Costs.

The VICE-CHANCELLOR:—

If a Purchaser makes the Suit necessary by a frivolous Objection to the Title, he must bear the Costs which he has thus improperly occasioned; but if he states a serious Objection, as to which it is reasonable that he should have the Title fortified by the Opinion of the Court, the Court will not compel him to pay Costs, although the Objection fails. The principle must

be the same with respect to the Purchaser's suggestions of doubt as to matters of fact. The Court thought the doubt, as to the Bankrupt's having executed Power of Appointment before the Bankruptcy, entitled to so much weight, that it directed an Inquiry to that effect; and although the *Master* has found that the Power was not executed by the Bankrupt, I cannot say that the suggestion of the Defendant was frivolous. I think the Purchaser in this Case was not unreasonable in questioning both the Law and the Fact, though as to both, the Opinion of the Court has been against him, and I cannot therefore order him to pay the whole Costs of the Suit. A Party who fails can never receive the Costs of a Suit, and each Party must bear their own Costs.

1819.

THORPE
v.
FREER.

Dutchess Dowager of BUCCLEUCH and QUEENSBURY, and CHARLES WILLIAM Duke of BUCCLEUCH and QUEENSBURY - Plaintiffs;
and
HENRY HOARE, MONTAGUE BARTON, HARRIET BARTON, THOMAS BARTON BOWEN, and JOHN CROFTS - Defendants.

7th December.

THE Question in this Case was, Whether certain Heritable Bonds, and the Money due thereon, descended to the Heir at Law of the late Admiral *Barton*, or passed under his Will?

Heritable Bonds, together with English Securities, were given on a Loan of Money, to a domiciled Englishman. Held, that a Will, disposing of the Money due on such Securities, was effectual; and that the Heir at Law of the Testator had no claim in respect of the Heritable Bonds.

1819.

Dutcheas
Dowager of
BUCCLEUCH, &c.
and another,

v.

HOARE.
and others.

On the 7th April 1773, *Henry*, late Duke of *Buccleuch*, executed to *Hugh Dive* an Heritable Bond or Mortgage, for securing 6,000 *l.* and Interest; and *Hugh Dive* was duly enfeoffed, and had Livery of Seisin of the Estate, according to the Law of *Scotland*.

Hugh Dive, by Deed, 19th June 1779, assigned the Heritable Bond or Mortgage, and the annual Rent, Land and Premises unto *Henry Drummond*; and the latter applied for payment of the Money due thereon, and Admiral *Barton*, at the request of the Duke of *Buccleuch* and *George Duke of Montague*, agreed to advance the sum of 6,000 *l.* to be paid to *Drummond*, on having the re-payment secured by an Assignment or Transfer of the said Heritable Bond, and also by the joint and several Bond of the said Duke of *Buccleuch* and *George Duke of Montague*; and accordingly, on the 7th September 1779, *Drummond* assigned the Heritable Bond to Admiral *Barton*, his Heirs and Assigns; and the Duke of *Buccleuch* and *George Duke of Montague* on the same day, executed to Admiral *Barton* a joint and several Bond in the penal sum of 1,200 *l.* reciting the Assignment to Admiral *Barton*, and the Heritable Bond; and that, for further securing the re-payment of the sum of 6,000 *l.* and Interest, the joint and several Bond was agreed to be given. By an Indenture of three Parts, on the same 7th September 1779, *George Duke of Montague* assigned to Admiral *Barton* a Mortgage of 6,000 *l.* to which he was entitled as Executor of his Wife, subject to a prior Mortgage, as a further Security to, Admiral *Barton*.

On the 7th May 1781, Admiral *Barton* advanced to the Duke of *Buccleuch* a further sum of 2,000 *l.*; for

securing the re-payment of which with Interest, on the following 7th November, the Duke executed another Heritable Bond to the Admiral, his Heirs and Assigns, who on 23d July, in the same year, according to the Law of *Scotland*, had Livery of Seisin, and was enfefted at the annual Rent of 100 *l.* and also of the Lands, and had Livery of Seisin ; and for further securing the said 2,000 *l.* the Duke of *Buccleuch* and the Duke of *Montague* executed a joint and several Bond in the penal sum of 4,000 *l.*

1819.
Dutchess
Dowager of
BUCCLEUCH, &c.
and another,
v.
HOARE
and others.

The Duke of *Montague* died in the said month of May, having by his Will appointed the Plaintiff Executrix thereof, and the Dutchess proved the same.

On the 30th December 1795, Admiral *Barton* died without Issue, having previously made his Will, 13th April in that year, and appointed *Henry Hoare*, *M. Garthshore*, *John Morgan*, and the Reverend *Edward Salter*, his Executors, who proved the Will ; but, by the death of the others, *Hoare* became the surviving Executor. By the Will of *Barton*, after reciting that he was possessed of two several Bonds or Obligations for 8,000 *l.* of the Dukes of *Buccleuch* and *Montague*, he bequeathed the same to his Executors, in Trust, to pay the Interest to his Wife during her life ; and to pay, after the death of his Wife, to his Nephew *M. Barton* 4,000 *l.* ; and to his Niece *Dehittia Salter*, the Wife of *Edward Salter*, 4,000 *l.*

The Duke of *Buccleuch*, who afterwards became Duke of *Queensbury*, died in January 1812, leaving the Plaintiff *Charles William* (now Duke of *Buccleuch*) his eldest Son and Heir at Law, having by his Will appointed the

1819.

Dutchess
Dowager of
BUCCLEUCH, &c.
and another,

v.

HOARE
and others.

Plaintiff *Charles William Duke of Buccleuch* sole Executor thereof, who proved the same; and the Lands comprised in the said Heritable Bonds descended to him as the eldest Son and Heir of the late Duke of *Buccleuch* and *Queensbury*.

The Interest of the two sums of 6,000 *l.* and 200 *l.* was paid by the said *Henry Duke of Buccleuch* to Admiral *Barton*, from time to time during his life; and after his death was paid to *Hoare*, as the surviving Executor of *Barton*, down to the day of payment next preceding the death of the said Duke, under the idea, that *Hoare*, as the Executor of Admiral *Barton*, was entitled to receive the same.

After the death of *Henry Duke of Buccleuch* and *Queensbury*, the Plaintiff, his Dutchess, on the 22d December 1813, paid the two principal sums of 6,000 *l.* and 2,000 *l.* to *Hoare*, together with the Interest, under the persuasion that *Hoare*, as the surviving Executor of *Barton*, was entitled to receive the same; but doubts afterwards occurring to the Solicitor of the Dutchess, whether the Heritable Bonds were not by the Law of *Scotland* real Estate, he applied to *Hoare* not to pay the Money away; and, on the 14th January 1814, a Letter was written by such Solicitor to *Hoare* on the subject, who returned an Answer, that he had paid the Interest of the Money so paid to him to Mrs. *Barton* for her Life, and after her death he had paid the Principal to the Legatees.

The Bill, after stating the foregoing facts, further stated, that Admiral *Barton* died without Issue, leaving the Reverend *Charles Barton*, the eldest Son of his

eldest Brother, the Reverend *Cuts Barton*, deceased, his Nephew and Heir in *England*; and leaving his Brother *Robert Barton*, who was next Brother to the said *Cuts Barton*, and the immediate elder Brother of Admiral *Barton*, and his Nephew the said *Montagu Barton*, in his Will named, who was eldest Son of *Montagu Barton*, then deceased, the immediate younger Brother of the Testator him surviving; and that the said *Robert Barton* died in 1798, without Issue, leaving his Nephews *Charles Barton* and *M. Barton* surviving, having first made his Will, leaving several Executors who afterwards died; and *Delitia Salter* is now his personal Representative; and that *Charles Barton* died in 1815, leaving Issue *Charles Cuts Barton*, his only Son and Heir, an Infant, having first made his Will, whereby he gave the Residue of his Estate to *Harriet Barton* his Wife, and appointed his Wife, and *Thomas Bowen*, and *John Crofts*, Executrix and Executors of his Will, who proved the same; and that *Rachael Barton*, the Widow of Admiral *Barton*, died 19th January 1813, having by her Will appointed *Thomas Bowen* sole Executor thereof, who proved the same.

1819.

Dutcheas
Dowager of
BUCCLEUCH, &c.
and another,
v.

HOARE
and others.

The Prayer of the Bill was for a Declaration, which of the several Parties were entitled to the Heritable Bonds and the other Securities, and to the principal Monies thereby secured, and the Interest which became due thereon, after the death of Admiral *Barton*; and if the Court should be of Opinion, that the said Securities, or the Money thereby secured, were not well disposed of, or passed by the said Testator's Will, then that the Defendant *Henry Hoare* might be directed to pay the said principal Sums and the Interest thereof, from time to time received by him, to the Party or Parties to

1819.

Dutchess
Dowager of
Buccleuch, &c.
and another,
v.

HOARE
and others.

whom the Court should declare such Interest to belong, so far back as such Interest ought to be recovered; and for that purpose, that an Account might be taken of what was due to such Heir at Law, or Party or Parties, for Principal and Interest respectively, and that the Defendant *Charles Cutts Barton*, as the Heir, or such other Party or Parties in whom the said Securities were vested, might assign or discharge the same, as the Plaintiff *Elizabeth Dutchess Dowager of Buccleuch* should direct; and that the Defendant *Charles Cutts Barton*, the Heir of the said Admiral *Barton*, or such other Person of the Defendants as might be his Heir; and also, all proper Parties might join in such Deeds or Instruments, and do all such proper acts, as should be necessary for the purposes aforesaid; and also for discharging, releasing and acquitting the said Estates, Lands and Premises, situated in *Scotland* aforesaid, belonging to the said Duke of *Buccleuch*, from the Charges and Incumbrances made or created, or brought upon the same, or on any part thereof, by the said Heritable Bonds; and also for the purpose of re-assigning the said Mortgage; or that the Defendant *Henry Hoare* might pay back to the Plaintiffs the Monies so received by him for Principal and for Interest, accrued since the death of Admiral *Barton*, so far back as such Party or Parties is or are entitled to recover or receive the same, together with Interest on the principal Sums from the time of the Receipt thereof; and that the Defendants, or their Representatives, to whom the said *Henry Hoare* paid the same Monies, might pay back the same to him, or that the same might be ordered to be paid into Court in Trust, in this Case, until the Rights and Claims of all the said Defendants, and other Persons claiming any Right or Interest, should be settled and

decided, and that all proper Directions might be given for the purposes aforesaid; and that in the meantime the said Defendants, and particularly that the said *Charles Cutts Barton*, or such of the said Defendants as may be the Heir of the said Admiral *Barton*, might be restrained by Injunction from levying the said annual Rent mentioned in the said Heritable Bonds, or using the same, or any of the Powers therein and thereby expressed or given, or from enforcing the same, or commencing any Action or Process at Law in *Scotland*, or in any Court of Law or Equity, upon the said Heritable Bonds, or either of them, against the said Lands and Premises charged therewith, or against the said Plaintiffs, in any manner whatsoever relating to the said Bonds or the Sums therein mentioned, or to the Measures aforesaid.

1819.
 Dutchess
 Dowager of
 BUCCLEUCH, &c.
 and another,
 v.
 HOARE
 and others.

On the opening of the Pleadings, the *Vice-Chancellor* observed, it was a Question between the Heir and the Executors of *Barton*, and desired to hear their Counsel.

Mr. *Bell*, and Mr. *Shadwell*, for the Defendant
Hoare :—

It is clear, that if only English Bonds and an English Mortgage had been taken by Admiral *Barton*, as a Security for the Money he advanced, the Money due upon such Securities would have been personal Estate, and would pass as such under the Bequest by the Admiral. The taking of the Heritable Bonds, as an additional Security, can make no difference, nor alter the nature of the Transactions; the Admiral and his Executors might have brought an Action for the Money.

1819.

Dutchess
Dowager of
BUCCLEUCH, &c.
and another,
v.

HOARE
and others.

Mr. *Heald*, and Mr. *Daniell*, jun. for the Heir at Law:—

This is a new Case. If the only Security given to Admiral *Barton* had been the two Heritable Bonds, could it be contended that the Heir at Law was not entitled to those Bonds? Do then the additional English Securities make any difference? The Heritable Bonds were the principal Securities; the English Securities were only as auxiliary to the principal Security. In *Johnstone* and others v. *Baker* and others (a), de-

12th June, 1817. (a) The circumstances of that Case were thus:—The Cause was heard on the 16th May 1808. The Suit being instituted for the purpose of establishing the Will of *Charles Johnstone*, and for carrying the Trusts thereof into execution. On the Hearing, the late *Master of the Rolls* (Sir *W. Grant*) referred it to the *Master*, to enquire and state what Property or Securities in *Scotland* the Testator was possessed of, or entitled to, at the time of making his Will.

The *Master*, by his Report, found, that by a certain Heritable Scotch Bond, or Writing obligatory, bearing date the 31st day of April 1799, *Alexander M'Konochie*, therein described as a Writer in *Edinburgh*, did grant to have borrowed and received from *Archibald Douglas, J. Banks*, and

R. Glover, the sum of 25,000*l.* sterling Money, which Sum he the said *Alexander M'Konochie* did thereby bind and oblige himself, his Heirs, Executors and Successors whomsoever, to content and repay to the said *A. Douglas, J. Banks* and *R. Glover*, and to the Survivors and Survivor of them, and to the Heirs and Assigns, and the Heir and Assignee of the Survivor, upon the 11th day of November then next in the said year 1799, with the sum of 5,000*l.* liquidated Penalty in case of failure, together with the due and lawful Interest of the said principal Sum, at two Terms in the year, *Martimas* and *Whitsunday*, by equal Portions, beginning the first Term's Payment upon the 11th November then next; and for further Security and more sure Payment

cided by the late *Master of the Rolls*, Sir *William Grant*, 12 June 1817, it was held, that Heritable Bonds, given as Security for Money advanced, did not pass under general words in a Will, but descended to the Testator's Heir at Law.

of the said principal sum of 25,000*l.* sterling, with the Interest and the Penalty before stipulated, he the said *Alexander M'Konochie* did thereby sell, alienate and dispose to and in favor of the said *Archibald Douglas*, *J. Banks*, and *R. Glover*, and the Survivors and Survivor of them, and their aforesaid hereditarily, but redeemable always in manner thereafter mentioned, certain Lands, Tenements and Hereditaments particularly mentioned and described in said real Security, and for Payment to them and their aforesaid of the aforesaid principal sum of 25,000*l.* with the stipulated Interest and Penalties; and that by divers Assurances in the Law, and ultimately by a Deed of Disposition, bearing date the 30th November 1799, and by certain Indentures of the 3d and 4th days of December 1799, the sum of 21,000*l.* part of the said sum of 25,000*l.* secured by the before mentioned Scotch Bond, became vested in *R. B. Johnston*, Bart.

and *Charles Johnstone* the Testator; and the said *Charles Johnstone*, being thus entitled to such Moiety so secured by the Heritable Bond as aforesaid, and considerable other real and personal Estate, by his Will, dated the 10th April 1811, gave and bequeathed unto *Henry Baber*, *Henry Lloyd*, and *James Fleming Baxter*, their Heirs, Executors, Administrators, &c. all and singular his real and personal Estates of what kind soever in *Great Britain*, *America*, or elsewhere, upon the Trusts therein mentioned. And the Testator, by his Will, directed that all his Property and Securities for Money in *Scotland* should, for the Purposes of his said Will, be considered as personal Estate, and pass to his said Trustees, as far as he could by his said Will affect the same, as if the same were his personal Estate in *England*; and that all his Estate and Interest therein, of what nature or kind soever, should pass to and vest in his said Trustees,

1819.

Dutchess
Dowager of
BUCCLEUCH, &c.
and another,

v.

HOARE
and others.

1819.

Dutchess
Dowager of
BUCCLEUCH, &c.
and another,
v.

HOARE
and others.

THE VICE CHANCELLOR:—

In *Johnstone v. Baker* the Heritable Bond was the only Security given, and could not pass by the English Will. Here there are English Securities also which do pass by the English Will. Where there are several

their Heirs, Executors, Administrators and Assigns. The Testator died, leaving the Defendant *William Johnstone* his eldest Son and Heir at Law, without having conveyed by any Deed vesting the Heritage, or affecting or concerning his Share or Interest in the said Heritable Bond, or the Monies thereby secured; and the Defendant *William Johnstone* therefore claimed to be entitled to the Share or Interest of the said Testator of and in the said Heritable Bond, and one Moiety of the Money due thereon, from the 11th November 1804, being *Martinmas*, preceding the day of the death of the said Testator. And the Master found that his Predecessor directed a Case, stating the several facts and circumstances before noticed to be laid before the *Lord Advocate of Scotland*, as to the Evidence required by the Land of *Scotland*, to prove that the Testator was possessed of or entitled to the said Security at the time of his death, and to

give his Opinion, whether by the Law of *Scotland*, the same or any part thereof passed by his Will, or descended to the said Defendant *William Johnstone*, as his eldest Son and Heir at Law; and in case the same descended to the said *William Johnstone*, whether he was entitled to the Interest that accrued thereon from the day of the death of the said Testator *Charles Johnstone*, or from what other time; whereupon the said *Lord Advocate* stated, he was of Opinion, that the Will of the said Testator *Charles Johnstone* was ineffectual for conveying the said Heritable Debt in question, but that the same did on the death of the said Testator *Charles Johnstone*, legally descend to his eldest Son and Heir at Law. And the said *Lord Advocate* was also of Opinion, that if the said Testator died before *Whitsunday* 1805, the Trustees under his Will had a right to Interest upon the Bond up to *Martinmas* 1804, and the Heir at Law to the Interest

Securities for the same Debt, an Assignment or Gift by the Creditor of one Security is an Assignment or Gift of the Debt, and neither the Creditor nor his Representatives can be permitted to set up the other Securities for the purpose of defeating that Assignment or Gift. It follows, therefore, that as to the Securities not given by the Will, the Heir of the Testator is a Trustee for the Legatee.

1819.

Dutchess
Dowager of
BUCCLEUGH, &c.
and another,
v.
HOARE
and others,

due at *Whitsunday* 1805; but if the said Testator did not die till after *Whitsunday* 1805, then the Trustees had a right to the Interest up to the *Whitsunday* 1805; whereupon, and upon reading an Affidavit of Mr. J. Williams, verifying an Extract from the Register of the Burial of the said Testator, whereby it appears that he was buried previous to *Whitsunday* 1805, the said Master found, that the said Heritable

Deed did not pass by the Will of the said *Charles Johnstone*, but that the same descended to the Defendant *William Johnstone*, as his eldest Son and Heir at Law, who is thereby become entitled to the same, together with the Interest due thereon from *Martinmas* 1804. On the 12th June 1817, the Cause came on again before Sir *William Grant* for further Directions: and he decreed accordingly.

Ex parte WATSON, *in re* SHEATH.

THE Petitioner *Watson* had been in Partnership with the Bankrupts, *Abraham Sheath* the elder, *Challis Sheath*, and *Abraham Sheath* the younger, as Bankers, 30th December. A solvent Partner, winding up the Partnership Concerns, is entitled to prove under the Commission, against the Bankrupt Partners, the Share of the Loss or Deficiency which each Partner ought to have borne, as a Debt against his separate Estate.

1819.

Ex parte
WATSON,
in re
SHEATH.

at *Wisbeach*. *Abraham Sheath* the younger was a nominal Partner, and was not to share in the Profit or Loss. The Petitioner had wound up the Concerns of the Partnership, and had paid the whole Deficiency or Loss, amounting to 30,700 *l*. The separate Estate of *Challis Sheath* had paid a small Dividend, but was stated to be now insolvent. The Petition prayed, that the Petitioner might be at liberty to prove a *Moiety* of the 30,700 *l*. against the separate Estate of *Abraham Sheath* the elder, or might make such other proof as the Court should direct.

The VICE-CHANCELLOR:—

It is now settled, that a solvent Partner, winding up the Partnership Concerns, is, under Sir *S. Romilly's* Act, to be considered as a Surety, paying after the Bankruptcy in respect of his previous liability. Each Partner is a principal Debtor for his own Share, and they are mutually Sureties to the Creditors for the Share of each other. The Petitioner was a Surety for the One-third as to which *Abraham Sheath* the elder was a principal Debtor, and in like manner a Surety for the One-third of *Challis Sheath*. He can only prove against the Estate of *Abraham Sheath* the elder that One-third as to which he was his Surety, and he is entitled to the same proof against the Estate of *Challis Sheath*.

1819.

Ex parte BRERETON, *in re* SUTTON.

20th December.

THIS was a Petition to tax a Solicitor's Bill of Costs up to the Choice of Assignees, that had been taxed by Country Commissioners at 149 *l.* which was stated to be nearly double the ordinary Amount. The *Vice-Chancellor* said, the Statute gives authority to the Commissioners to tax the Solicitor's Bill up to the Choice of Assignees; and the Application to this Court being by way of Appeal, must state specific Errors.

A Petition for an Order to tax a Solicitor's Bill of Costs up to the Choice of Assignees, after it has been taxed by the Commissioners, will not be granted, unless specific Errors are stated.

Ex parte LANE and others, in the Matter of KINGSBRIDGE SCHOOL.

21st December.

WILLIAM DUNCOMBE by his Will, dated the 20th of *April* 1691, devised his real and personal Estate to certain Persons, whom he appointed his Executors, upon Trust, "that they, (his Executors,) with the consent of the Inhabitants of the Town of *Kingsbridge*, should choose a Lecturer to supply the Church when the Incumbent is absent at *Chestow*, (which is the Mother Church of *Kingsbridge*,) on the Lords-day; and for so officiating and preaching once every Lord's-day, and instructing the People from House to House, should give him 50 *l. per annum*, by quarterly Payments, pro-

Where in respect of the increased Rents of a Charity Estate it is referred to a Master to approve of a Scheme for their future Application, and he recommends an Augmentation of a Salary given by the Will of the

Founder, he is not with respect to the Augmentation strictly confined to the Provisions of the Will as to the original Salary, but may engraft upon it a new Condition in furtherance of the Testator's general intention.

1819.

Ex parte

LANE

and others,

in the Matter of,

KINGSBRIDGE

SCHOOL.

vided the Person so chosen should be neither the Schoolmaster nor the Usher, nor the present Incumbent or Pastor of the Place, 'but a Man of a sober, christian Life and Conversation, in their account fully qualified for that Work, and no Papist, either open or suspected; and moreover, should preach once a month on one of the Week-days which he should judge most convenient, if public Authority would permit; he also directed, that besides his annual stipend of 50*l.* he should have paid him by his Executors 3*l.* yearly to give away, or buy Books to give away to poor Parishioners for their Encouragement to learn a Catechism and pray in their Families, according to the advice of the Lecturer; and the Lecturers should give a particular Account how that 3*l.* was bestowed in Writing, to the Trustees on *Midsummer-day*. Furthermore, it was his intent and meaning, that if his Executors or Trustees came to understand, that the Minister or Lecturer chosen by them did not his Duty in a competent manner, they and the Town being Judges, it should be in their power to withhold the annual Allowance from him, and choose another in his room." The Testator then directed the payment of certain other annual Sums, the amount of which was specified to different Objects, and the Overplus to be laid out and employed for certain other specified Purposes, (still restricted as to the Amount). And then followed this Proviso, "that if ever it came to pass, that there should be a settled Minister in every Town, and Pluralities be utterly renounced and made void by Law, his Will was, that instead of preaching once every Lord's-day, then he that was chosen to have the 50*l.* yearly should preach and lecture once a Week in concord with the Pastor of the Place;" and also, "that if ever the Minister or Lecturer should be chosen

Master of the School at *Kingsbridge*, or Usher, the 50*l.* should not be allowed, because either of those two Callings was enough for any Man that intended to discharge his Duty faithfully."

1819.
Ex parte
 LANE
 and others,
 in the Matter of
 KINGSBRIDGE
 SCHOOL.

Upon a reference to the *Master* to approve of a Scheme, to be laid before him by the Trustees of the Charity, for the due and proper Application of the Surplus paid, and of the future Rents and Profits of the Charity Estates, the *Master* certified his Approbation of a Scheme so laid before him; whereby (among other things) it was proposed, that in addition to the annual sum of 50*l.* by the Will provided for the Lecturer, the Trustees "should give and dispose of the further sum of 25*l. per annum*, by equal quarterly Payments, to the Lecturer for the time being, during such time as he should reside at *Kingsbridge*, and do his Duty pursuant to the said Will to the Satisfaction of the Trustees, but no longer."

A Petition was presented on behalf of some of the Inhabitants of the Town of *Kingsbridge*, praying, that it might be referred back to the *Master* to review his Report, so far as related to the 25*l. per annum* proposed to be given to the Lecturer, "and to make the Title of the Lecturer to receive the said additional Sum, subject only to the same Terms and Conditions as his Title to receive the annual sum of 50*l.* is by the said Will made subject to;" and in support of this Petition it was alleged, that by the Will, the Consent of the Inhabitants is necessary in the Choice of the Lecturer, and the Inhabitants are thereby, jointly with the Trustees, constituted Judges to determine whether the Lecturer does his Duty in a competent manner; also, that the

1819.

Ex parte
LANE
and others,
in the Matter of
KINGSBRIDGE
SCHOOL.

Condition of Residence, proposed to be annexed to the additional Salary, is not imposed by the Will as to the original 50 *l.* but the same is thereby made to depend solely on the Lecturer doing his Duty pursuant to the Will, to the Satisfaction as well of the Inhabitants as of the Trustees.

Mr. *Winthrop*, in support of the Petition :—

Mr. *Merivale*, for the Trustees, contended, that in directing an Augmentation of the Fund appropriated to a charitable Purpose, the Court is not bound by the letter of the Foundation, but will exercise a discretion as to the Application, regard being had to the general intention of the Founder ; and he read several passages from the Will, from which it was to be inferred, that the Testator contemplated the Residence of the Lecturer, though he had not expressly provided for it. The present Lecturer was the Incumbent of a Parish at some distance, where he resided ; and the Clause was expressly inserted by the Trustees, in order to hold out an inducement to him to reside at *Kingsbridge*, as well as to provide against the Appointment in future of a non-resident Lecturer.

The VICE-CHANCELLOR :—

Although the Founder has not in express words excluded the Incumbent of another Parish from being appointed to the Office of Lecturers at *Kingsbridge*, yet his plain intention is, that the Lecturer shall be a Person who can devote his whole time to the duties of that Situation. If therefore the *Master* was not at liberty, with respect to the Augmentation, to engraft any new Provision not found in the Will of the Founder, I might

think him well justified in the introduction of the Condition of Residence. But I consider, that with respect to the Augmentation, the *Master* is not confined to the Provisions in the Will of the Founder, but may stipulate for an additional advantage in furtherance of the Founder's general intention; and would, in that view, be justified in making Residence a necessary Title to the 25 *l*.

1819.
Ex parte
 LANE
 and others,
 in the Matter of
 KINGSBRIDGE
 SCHOOL.

I think, however, it would be fit, as the Inhabitants of the Town have, by the Will, a Voice in determining whether the Lecturer discharges his Duty, and is entitled to the 50 *l*. that they should have the same Voice with respect to the 25 *l*. And let the *Master*, as to that point, review his Report.

Ex parte HOLLAND, *in re* HARVEY.

IN this Case the *Vice-Chancellor* held, that upon the Sale of a Copyhold Estate, under a Commission of Bankruptcy, a good Title may be made to a Purchaser by a Bargain and Sale immediately from the Commissioners; and that an intermediate Bargain and Sale to the Assignees was unnecessary. He relied upon *Drury v. Man* (a).

22d December.

Where a Copyhold is sold under a Commission of Bankruptcy, a good Title is made by a Bargain and Sale from the Commissioners to the Purchaser.

Mr. Bell, Mr. Sugden, and Mr. Sidebottom, in support of the Objection:—

Mr. Rose, *contra*.

(a) 1 Atk. 95; and see 2 Madd. Prin. & Pract. 628. 2d edit.

1819.

11 & 24 Dec.

-17th Jan. 1820.

SMITH v. CLAXTON and others.

Where Land is devised to be sold, and there is a partial failure of the purpose of the Devisor as to the Price, but there remains some purpose of the Devisor to be answered by a Sale, there the Heir takes the benefit of the partial failure as Money, and not as Land.

But if there be a total failure of the purposes of the Devisor as to the Price, his intention as to a Sale is to be considered as not applying to the Events which have happened, and the Heir takes the Land as real Estate.

THOMAS SMITH by his Will, 1st April 1811, after making certain specific Bequests to his Wife *Margaret Smith*, bequeathed all other his personal Estate and Effects of what nature or kind soever unto *P. Hisilton* and *Thomas Stevenson*, (two of the Defendants,) their Executors, &c.; and devised all his Freehold Messuages, Dwelling Houses, Tenements and Hereditaments, situate in the Town of *Stokesley*, unto the Use of *Hisilton* and *Stephenson*, their Heirs and Assigns, upon Trust, as soon as might be after his decease, to sell and dispose of his said real and personal Estate and Effects for the best Price that could be reasonably had or gotten for the same; and directed his Trustees, and the Survivor, &c. to stand possessed of the Money to arise and be produced by the Sale, upon Trust, to pay such Debts as he might owe at the time of his decease, his Funeral Expences, and the following Legacies; viz. to his Wife 40*l.* to be paid immediately upon his decease; to his Son *Thomas Smith* 10*l.* to be also paid immediately after his decease; to his Son *Joseph Smith* (a Defendant) 300*l.*; to his Son *Robert Smith* 1,000*l.*; and to his Niece *Mary Potter* 40*l.* The three last Legacies to be paid at the end of six calendar months after his decease, without Interest, if they should be living, but not otherwise. And, upon further Trust, to pay Testator's Nephew in Law *Thomas Caxton* 40*l.* to be paid at the age of 21 years, and subject thereto and to the Provisoes in his Will; upon Trust, to pay the ultimate Residue or Surplus to his Wife, her Executors, &c. And the Testator by his Will further

gave and devised all his other Freehold Closes or parcels of Ground in the Township or Parish of *Stokesley*, knowh by the name of *Mill Riggs*, unto *Hisilton* and *Stephenson*, their Heirs and Assigns, upon Trust, to receive the Profits thereof, and to pay the same to his Wife during her Life; and after her death, during the Life of his Son *Thomas*, to pay the same into his proper hands, &c.; and after his said Son's decease, that his said Trustees should stand seised of the said Closes, upon Trust, to sell the same, and to apply the Money arising by the Sale to and amongst *Robert* the Son of the said Testator's Son *Thomas*, and all and every other Child or Children of his said Son *Thomas* lawfully to be begotten, in equal Shares, to be considered a vested Interest in them respectively as and when they should attain twenty-one; but if his said Grandson, and all other the Children of his said Son *Thomas* thereafter to be born, should die before any of them attained twenty-one years, unmarried, and without Issue, then the Money to arise by the Sale of the said Closes should be in Trust for the Testator's Sons *Joseph* and *Robert*, (in equal Shares,) their Executors, &c. And the Testator further gave certain other Freehold Estates, and certain Leasehold Estates, to the same Trustees upon Trust, to pay an Annuity of 27*l.* to his Son *Thomas* during the Life of his Wife, and subject thereto to pay the Rent and Profits to his Son *Robert* for his life; and after the death of *Robert* to sell the same, and apply the Produce for the benefit of the Children of *Robert* in manner therein mentioned; and if there should be no Children of *Robert*, then the Money to arise from the Sale should be in Trust for his the Testator's Sons *Thomas* and *Joseph*, in equal Shares, their Executors, &c.

1819.

SMITH

v.

CLAXTON
and others.

1819.

SMITH
v.
CLAXTON
and others.

The Testator died 29th February 1816, and left surviving *Thomas Smith* his eldest Son and Heir at Law; and also his two other Children *Margaret Smith* and *Joseph Smith*; but the Testator's Wife, and his Son *Robert*, and also his Grandson *Robert*, (the Son of the Testator's Son *Thomas*,) died in the life-time of the Testator. The Legacies bequeathed to them having lapsed, the other specific and pecuniary Legacies and Debts charged upon the Testator's Freehold Estate, in aid of his personal Estate, were very small, and were paid out of his personal Estate, which was more than sufficient for the payment of the same.

Thomas Smith, the Son, died 14th June 1816, without Issue, having previously made his Will, but not attested, so as to pass real Estates in favour of the Plaintiff, his Wife, and others; and the Wife filed the present Bill to obtain a Decision as to the effect of the Will of *Thomas Smith* the elder, and the Questions were :

1st. Under the first Devise, Whether, as the Debts and Legacies were paid from the personal Estate, and the Wife was dead, *Thomas*, the Heir of the Testator, took the Estates, as Land which descended to his Heir; or as Money, which passed to his personal Representative?

2d. Under the second Devise, Whether, as the Testator's Son *Robert* had died in his life-time, the Moiety of the Produce of the Sale, which was given to him, and being lapsed by his death, vested in *Thomas* as the Heir of the Testator, was to be considered as Land descending to the Heir of *Thomas*; or as part of the personal Estate of *Thomas*?

3d. Under the third Devise, Whether the Moiety of the Produce of the Sale, which *Thomas* the Heir took by Limitation, upon failure of *Robert* and his Children, was also to be considered as Land descending to the Heir of *Thomas*; or as part of the personal Estate of *Thomas*?

1819.
SMITH
v.
CLAXTON
and others.

Mr. *Bell*, and Mr. *Willis*, for the Plaintiff :—

Mr. *Sugden*, for the Executors of *Thomas Smith* and Son, in the same Interest :—

The real Estate at *Stokesley*, first devised, is by the Will directed to be converted into Personalty; but that Direction did not give it the character of personal Estate of the Testator; and the purpose failing, for which it was to be so converted, by the death of the Testator's Wife in his life-time, there was a resulting Trust for *Thomas* the eldest Son and Heir at Law of the Testator; but being directed by the Testator, his Father, to be converted into Personalty, it is part of the personal Estate of *Thomas* the Son, and he being dead, the Estate must be sold, and the Produce paid to his Executors, to be applied according to the Trusts of his Will. Several Cases establish this Doctrine: *Levet v. Needham* (a), *Hewit v. Wright* (b), *Fletcher v. Ashburner* (c), *Wright v. Wright* (d), *Fletcher v. Ashburner*, was published by Mr. *Browne*, from a Note of Lord *Redesdale*'s, which he gave to Mr. *Browne* (e). With

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| (a) 2 Vern. 138. | Mr. <i>Browne</i> 's Reports, from |
| (b) 1 Bro. C. C. 86. | page 497 to page 549, were, |
| (c) Ibid. 497. | as I have been informed, pub- |
| (d) 16 Ves. 188. | lished from Notes taken by |
| (e) All the Cases in the | Lord <i>Redesdale</i> , and given by |
| Appendix to the 1st vol. of | him to Mr. <i>Browne</i> . |

1819.

SMITH
v.
GLAXTON
and others,

respect to the Estate called *Mill Riggs*, it falls within the same principle; and as *Robert*, the Son of *Thomas*, died under twenty-one, unmarried, and without Issue, and *Thomas* had no other Child, one Moiety of the Produce of *Mill Riggs* belongs to *Joseph* the second Son of the Testator *Thomas Smith*, the Father; but the other Moiety resulted to *Thomas* the eldest Son and Heir of the Testator, and belongs to his Executors. The same principles apply to the Moiety given to *Thomas* under the third Devise: being directed to be converted into Personalty, it was part of *Thomas's* personal Estate.

Mr. *Wetherell*, and Mr. *Wilbraham*, for the Defendant *Joseph Smith*.

If the Testator has directed a Conversion out and out, the conclusion would be as contended for on the part of the Plaintiff; but the Question is, Whether on the face of this Will an Intention can be inferred, that there should be such a Conversion; or whether it was only to be converted for a particular partial purpose? In the latter case, if by deaths in the life-time of the Testator, and payment of the Debts and Legacies out of the personal Estate, the Conversion became unnecessary, the Estate, or so much as was not necessary to be converted for the purposes of the Will, results as real Estate to the Testator's Heir at Law, and will descend to his Heir. By the first Devise, a Conversion was directed only for a particular partial purpose, the payment of Debts and Legacies, and the Residue was given to the Wife, who died in the Testator's life-time; and as it is not wanted, either for Debts or Legacies, or to satisfy the Gift to the Wife, the Estate results as real Estate to the Heir at Law; and on his death

passes as such. So also on the same principle a Moiety of the Estate, given by the second and third Devise, passes to the real Representative of the Heir. In the Cases cited, there was a clear and manifest intention, that the Conversion should be out and out. *Hewitt v. Wright*, was the Case of a Deed; in *Emblyn v. Freeman* (f), the Estate, though actually converted into Money, was held to result to the Grantor as real Estate; in *Wright v. Wright*, the Produce of the real and personal Property were blended together, and made a joint Fund to be laid out in Security. The intention there, to convert out and out, was apparent.

1819.
SMITH
v
CLAXTON
and others.

The Case was afterwards re-argued, as to the first Devise only, by Mr. *Sugden*, and Mr. *Wilbraham*.

Mr. *Sugden*,—[After stating the first Devise]:—

The Question is, Whether this is to be considered as a Conversion out and out of the real Estate; and whether the Heir takes the resulting Trust as real or as personal Estate? If he took it as real Estate, as he is now dead, it descended to his Heir at Law; and if he took it as personal Estate, it goes to his personal Representatives.

The Cases on this subject may be thus classed: 1st. Where there is a Charge on the Testator's real Estate which fails, in that Case the Estate results to the Heir, *Cruse v. Barley* (g). 2d. Where, although a Sale of the real Estate is directed, part is not necessary to be disposed of: as where a Sale is directed for the pay-

(f) Prec. Chanc. 541.
VOL. IV.

(g) 3 P. Wms. 20.
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1819.

SMITH

v.

CLAXTON
and others.

ment of Debts and Legacies, and a Sale of part of the Estate is sufficient for that purpose, so much as is not sold results to the Heir, as in *Buggins v. Yates* (h), *Chitty v. Parker* (i), *Robinson v. Taylor* (k), *Halliday v. Hudson* (l), *Berry v. Fisher* (m), *Wilson v. Mayor* (n). 3dly. Where an absolute Conversion is directed by Will, *Levett v. Nedham* (o), *Mallabar v. Mallabar* (p), *Durrar v. Motteux* (q), *Collins v. Wakeman* (r), *Sheddon v. Goodrick* (s), *Ogle v. Cooke* (t), *Kennett v. Abbott* (u), *Fletcher v. Ashburner* (x), *Collingwood v. Wallis* (y), *Hewitt v. Wright* (z), *Van v. Barnet* (a). 4thly. Where the real Estate has been converted into Personalty, yet if the Legacy fails, the Heir takes: *Ackroyd v. Smithson* (b); but he takes it as personal Property, *Levett v. Nedham* (c), *Hewett v. Wright* (d), *Wright v. Wright* (e).

In this Case the Legatee having died in the Testator's life-time, the Heir had a right to elect whether what resulted to him should be taken as real or personal Estate; *Ackroyd v. Smithson* (f); until Election the Land retained the quality of Money; *Fletcher v. Ashburner* (g), *Whetdale v. Partridge* (h), *Biddulph v. Bid-*

(h) 9 Mo. 122.

(i) 2 Ves. jun. 271.

(k) 2 Bro. C. C. 589.

(l) 3 Ves. 210.

(m) 11 Ves. 87.

(n) Ibid. 205.

(o) 2 Vern. 138.

(p) For. 78.

(q) 1 Ves. 320.

(r) 2 Ves. jun. 183.

(s) 8 Ves. 496.

(t) 1 Bro. C. C. 501. 513.

(u) 4 Ves. 802.

(x) 1 Bro. C. C. 497.

(y) 1 Eq. Abr. 395.

(z) 1 Bro. C. C. 86.

(a) 19 Ves. 102.

(b) 1 Bro. C. C. 503.

(c) 2 Vern. 140.

(d) 1 Bro. C. C. 86.

(e) 16 Ves. 188.

(f) 1 Bro. C. C. 503.

(g) Ibid. 497.

(h) 8 Ves. 235.

dolph (i), *Kirkman v. Miles* (k). Here was a general Gift of real and personal Estate, as in *Flanagan v. Flanagan* (l), and *Fletcher v. Ashburner* (m).

1819.
SMITH
v.
CLAXTON
and others.

The Property was, unnecessarily, converted for the Widow, who he intended to take. He did not give it as real Estate. It appears that the Testator intended a Conversion, and that he did not in any Event intend the Heir to take. The Heir, it is true, takes without intention, but he cannot take against an intention to convert. I do not find any Case where a Question has arisen on these points between the Heir at Law of the Testator's Heir, and his personal Representative. The Heir has been held entitled to the resulting Trust, without saying in what quality he took the Property.

In this Case, it is admitted, the Heir takes the Estate as a resulting Trust; and the only Question is, in what quality he takes it. In *Levett v. Nedham*, the Heir took the resulting Trust in the Term, as personal Estate, though he took the Estate out of which it was carved, as real Estate. The Case of *Fletcher v. Ashburner*, seems decisive of the present Case.

Mr. *Wilbraham*, pursued the same course of Argument as before.

The VICE-CHANCELLOR:—

The inaccuracy of some Expressions, which are to be found in the Books, has created much of the difficulty which arises in Cases of this kind. I have anxiously

(i) 12 Ves. 161.

v. Ashburner, 1 Bro. C. C.

(k) 13 Ves. 338.

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(l) Mentioned in *Fletcher*

(m) 1 Bro. C. C. 497.

1819.

SMITH

v.

CLAXTON
and others.

considered every Authority which has been referred to ; and my endeavour has been to extract from them certain general principles which may admit of clear Application. Where a Devisor directs his real Estate to be sold, and the Produce to be applied to particular Purposes, and those Purposes partially fail, the Heir at Law is entitled to that part of the Produce which in the Events is thus undisposed of. The Heir at Law is entitled to it, because the real Estate was Land at the Devisor's death ; and this part of the Produce is an Interest in that Land not effectually devised, and which therefore descends to the Heir. It is for this reason that the Produce of an Estate, which the Devisor directs to be sold, can never be strictly part of his general personal Estate. If a Devisor directs such Produce to be paid to his Executors, and applied as part of his personal Estate, the Executors take it as Devisees. Every Person, taking an Interest in the Produce of Land directed to be sold, is in truth a Devisee, and not a Legatee. A Devisor may give to his Devisee either Land, or the Price of Land, at his pleasure ; and the Devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the Devisor. If it be the purpose of the Testator to give Land to the Devisee, the Land will descend to his Heir ; if it be the purpose of the Devisor to give the Price of Land to the Devisee, it will, like other Money, be part of his personal Estate. Under every Will, when the question is, whether the Devisee or the Heir failing, the Devisee takes an Interest in Land, as Land or Money, the true enquiry is, whether the Devisor has expressed a purpose that, in the Events which have happened, the Land shall be converted into Money ? Where a Devisor directs his Land to be sold, and the Produce divided

between *A.* and *B.* the obvious purpose of the Testator is, that there shall be a Sale for the convenience of Division; and *A.* and *B.* take their several Interests as Money, and not Land. So, if *A.* dies in the life-time of the Devisor, and the Heir stands in his place, the purpose of the Devisor, that there shall be a Sale for the convenience of Division, still applies to the Case; and the Heir will take the Share of *A.* as *A.* would have taken it—as Money, and not Land. But in the Case put, let it be supposed that *A.* and *B.* both die in the life-time of the Devisor, and the whole Interest in the Land descends to the Heir; the question would then be, whether the Devisor can be considered as having expressed any purpose of Sale applicable to that Event, so as to give the Interest of the Heir the quality of Money. The obvious purpose of the Devisor being, that there should be a Sale for the convenience of Division between his Devisees, that purpose could have no application to a Case in which the Devisees wholly failed, and the Heir would therefore take the whole Interest as Land.

To apply these principles, which I apprehend to be the true result of all the Authorities, to the present Case: Under the first Devise, the Estate is directed to be sold, and the Produce applied in aid of the personal Estate, in payment of Debts and Legacies; and the Surplus is given to the Wife. The Debts and Legacies are fully paid out of the personal Estate; and the Wife dies in the Testator's life-time. The whole Interest thus resulted to *Thomas* the Heir; and the Devisor's purpose of Sale being plainly for a Distribution, according to the Will, has no application to the Events which

1819.

SMITH
v.
CLAXTON
and others.

1819.

SMITH

v.

CLAXTON
and others.

have happened, and *Thomas* took the Estate as Land, which descends in that character to his Heir.

Under the second Devise, there is an obvious purpose of Sale for the convenience of Division between the Sons of *Thomas*, or failing them, between the Devisor's Sons *Joseph* and *Robert*. The only Son of *Thomas*, and the Devisor's Son *Robert*, both die in the Devisor's lifetime, and *Thomas* the Heir becomes entitled, by lapse, to the Moiety of the Produce intended for *Robert*. The purpose of Sale for convenience of Division still applies to the Events which have happened, and this Moiety is not Land, but personal Estate of *Thomas* the Heir.

Under the third Devise, there is the same obvious purpose of Sale; first, for a Division between the Children of *Robert*; and failing, then between *Thomas* the Heir and *Joseph*. There were no Children of *Robert*, but the purpose of Sale remains; and this Moiety also is not Land, but personal Estate of *Thomas* the Heir.

Under both these last Devises, *Thomas* the Heir might, by Agreement with his Brother *Joseph*, have elected to take his Interest as Land, but no such point is raised in the Pleadings, nor are there any Facts before the Court to that effect.

BROWNE and others v. GROOMBRIDGE
and others.

1819.

15th December.

THIS Cause came on for further Directions upon the Master's Report, by which it appeared, that *H. H. Browne* by his Will, dated the 18th day of February 1813, bequeathed unto his Wife *E. Browne* all his leasehold Messuage wherein he then resided, with its Appurtenants; and also the adjoining Messuage, then in the Occupation of *Mrs. Law*; and all other the Premises at *Blackheath*, which he held by virtue of two Indentures of Lease, theretofore granted him by *Mr. Lamb* and his Widow *Mrs. Lamb*; to hold to her his said Wife, her Executors, Administrators and Assigns, for all the Residue of his Estate and Interest therein respectively; she and they paying the Rents, and performing the Covenants reserved and contained in the said two several Indentures of Lease. And the said Testator also bequeathed unto his said Wife, all and every his Household Goods, Furniture, and Implements of Household, as well useful as ornamental, Plate, Pictures, Prints, Linen, China, Glass, Watches, Clocks, Jewels, Trinkets, (except his Diamond Shirt-pin,) and

The Testator gave to his Wife all his Ready-money and Bank-notes which he should have about his Person, or at his Residence, at his death. He gave specifically to others his Exchequer Bills, Stock, &c. He became insane two years before his death, and during that time two large Sums of Money, amounting to near 3,000 l. which had been paid at his House, were laid out for him in Stock and

Exchequer Bills: this was a due conversion of the Money; and the specific Legatees of the Stock and Exchequer Bills will be entitled to it.

The Testator gives specifically parts of his personal Estate, chargeable with his Debts and Legacies, and gives the Residue of his personal Estate to another: the Debts and Legacies fall upon the specific Gift, and not upon the Residue.

A Gift to all and every the Children of Nephews and Nieces, lawfully begotten, includes after-born Children.

A Provision in a Will for "Testamentary Expenses," does not include the Costs of a Suit occasioned by the Will.

1819.

BROWNE
and others,
v.

GREOMBRIDGE
and others.

Wearing Apparel, Books, Wines, Liquors, Chariot, Horses, Harness, and all and every other Matter or Thing in or about his usual Residence at the time of his decease, to and for the proper Use and Benefit of her his said Wife, her Executors, Administrators and Assigns. And the said Testator also gave to his said Wife, for her own sole Use, the Ready-money and Banknotes which he should have about his Person, or in or about his usual Residence at the time of his decease; or in case of his decease at any other Place than his usual Residence, he also gave to his said Wife all the Money and Banknotes which he should have with him. And the said Testator gave and bequeathed unto his Executors, thereafter named, 10,000 *l.* Share or Interest of and in the Five per cent. Navy Annuities, transferrable at the Bank of *England*, in Trust, to authorize and suffer his said Wife to receive and take the Dividends, Interest and Produce of the said 10,000 *l.* as the same should from time to time become due and payable, for and during the term of her natural Life; or otherwise, that they his said Executors, and the Survivors or Survivor of them his Executors or Administrators, should receive the same Dividends, Interest and Produce, and pay the same to his said Wife and her Assigns for and during the term of her natural Life; and from and after the decease of his said Wife, then, upon Trust, that they his said Executors, and the Survivors or Survivor of them, and the Executors and Administrators of such Survivor, should stand possessed of, and interested in, the said 10,000 *l.* to, for and upon such and the same Trusts, Ends, Intents and Purposes as are thereafter declared of and concerning the Residue of his Money in the public Funds, and other Securities

for Money. And the said Testator also bequeathed unto his said Executors 5,000*l.* Share or Interest of and in the Four per cent. Consolidated Bank Annuities, upon certain Trusts therein mentioned. And he gave to his said Executors all his Exchequer Bills, Money at the Bankers, and all and every the sum and sums of Money due or to become due to him on any Policy or Policies of Insurance on his Life, or on the Life of *William Johnson* ; and all sum and sums of Money, Parts, Shares and Proportions of and in the Public Stocks or Funds to which he should or might be entitled at the time of his decease, whether standing in his own Name, or in that of any other Person or Persons in Trust for him ; and all and every the Debt or Debts, sum or sums of Money, due and owing to him by any Person or Persons whomsoever, or upon what Security soever, upon Trust ; thereout in the first place, within one week after his decease, to pay to his said Wife 200*l.* lawful Money of *Great Britain*, and then to pay his Debts, Funeral and Testamentary Expenses ; and after making the said Payments, to pay certain Legacies ; and among others, to each of his Executors, thereafter named, 100*l.* Money, for the care and trouble which they might have in the execution of that his Will, and the Trusts thereby in them reposed, and also the Duty, payable in respect to the said Legacies to his said Executors, and subject to and chargeable with such Payments and last-mentioned Legacies ; the said Testator directed, that they, his said Executors, and the Survivors and Survivor of them, and the Executors and Administrators of such Survivor, should stand possessed of and interested in the said Exchequer Bills, Debt and Debts, sum and sums of Money, in Trust, to call and get in and convert the same into Money,

1819.

BROWNE
and others,
v.

GROOMBRIDGE
and others.

1819.

BROWNE
and others,

v.

GROOMBRIDGE
and others.

with all convenient speed after his decease; and after the same should have been got in and converted into Money, to lay out the Money thereby arising, as the same should from time to time be of a sufficient Amount, in their own Names or Name, in some or one of the Public Stocks or Funds, transferrable at the Bank of *England*; and that they should stand and be possessed of the Stocks and Funds wherein or whereon the said last-mentioned Money should be so laid out or invested; and all other his Parts, Shares and Proportions of and in the said Public Stocks or Funds so bequeathed to them his said Executors, as last aforesaid, to, for and upon the several Trusts, Ends, Intents and Purposes thereinafter mentioned; (that is to say) upon Trust, after paying the annual and other Payments on the Policy of Insurance on the Life of the said *William Johnson*, to authorize and suffer his, the said Testator's said Wife, to receive and take the Dividends, Interest and Produce of the said last-mentioned Annuities, as the same should from time to time become due and payable for and during the term of her natural life; or otherwise that they the said Executors, and the Survivors or Survivor of them his Executors or Administrators, should receive the last-mentioned Dividends, Interest and Produce, and pay the same to his said Wife, or her Assigns, for and during the term of her natural Life; and from and after the decease of his, the said Testator's said Wife, then, upon Trust, to levy and raise thereout the sum of 1,000 *l.* Money, and pay the same to Mr. *Thomas Fennall*, the Husband of his, the said Testator's said late Wife's Niece, his Executors or Administrators; and after payment of the said 1,000 *l.* and subject thereto, upon Trust, to transfer and pay such last-mentioned Stocks, Funds and Securities, and also the

āforesaid 10,000*l.* Navy Five per cent. Annuities, equally unto and among and between all and every the Child and Children lawfully begotten of his the said Testator's Nephews and Niece, *J. H. Browne, N. Browne, W. K. Browne,* and *H. H. Browne,* and *M. A. Woods,* by their then or late respective Wives and Husband, such Children to take *per capita* and not *per stripes*, in manner as in the said Will mentioned. And the Testator gave and bequeathed all the rest and residue of his Estate and Effects to his said Wife; and he appointed the Defendants, *Groombridge* and *Nelson,* Executors of his Will.

1819.
BROWNE
and others,
v.
GROOMBRIDGE
and others.

The *Master* further found, that the Testator's Wife died on the 10th day of September 1817, in the lifetime of the Testator, whereby the several Legacies and Bequests to her, contained in the said Testator's said Will, became lapsed; and that the said Testator died on the 18th day of November 1817; and that the Defendants, *Groombridge* and *Nelson,* proved his Will.

The *Master* further found, that the said Testator was incapable of managing his Affairs from the 15th October 1816, up to the time of his decease; and that during such Incapacity, (*viz.*) on or about the 27th day of October 1816, the said Defendant *Nelson* received from the said Testator's Wife the sum of 1,700*l.* being Money belonging to the said Testator; and that *Nelson,* by her Direction, laid out and invested the said sum of 1,700*l.* together with an additional sum of 5*l.* 7*s.* 6*d.* of his own Money, (which he afterwards reimbursed to himself) in the purchase of the three several sums of 844*l.* 17*s.* 6*d.* Navy Five per cent. Annuities, 613*l.* Bank Four per cent. Annuities, and 400*l.* Three per cent. Consolidated Annuities, in the Name of the

1819.

BROWNE
and others,
v.

GROOMBRIDGE
and others.

said Testator, and which respectively formed part of the sums of 11,000*l.* Navy Five per cent. Annuities, 13,000*l.* Bank Four per cent. Annuities, and 8,000*l.* Three per cent. Consols, respectively standing in the Name of the said Testator at the time of his decease. And that during such Incapacity of the said Testator, (*viz.*) on or about the 11th day of September 1817, the said Defendant *Nelson* also possessed the sum of 1,603*l.* 11*s.* 6*d.* (being the amount of Ready-money found by him in the Testator's Iron Chest, and otherwise;) and that *Nelson* laid out and invested the sum of 1,219*l.* 8*s.* 8*d.* part thereof, in the purchase of certain Exchequer Bills. The Questions were, first, as to the several sums of Stock and Exchequer Bills last-mentioned in the Report, whether they were to be considered as being in the state in which they were found at the Testator's decease, or (reference being had to his Incapacity at the Times when they were respectively converted,) to be taken as Ready-money in his house; and as such, to have been comprised in the Bequest, which lapsed by the death of the Testator's Wife, and passed to the next of Kin?

Mr. *Bell*, and Mr. *Merivale*, for the Children of the Testator's Nephews and Nieces:—

The Parties specifically entered to the Bank Stock and Exchequer Bills, under the Clause in the Will to that effect, above stated.

Mr. *Roupell*, for the next of Kin, in support of the Petition, that they were to be taken as Ready-money.

The *Vice-Chancellor* held, that they must be taken in the State in which they were found at the Testator's

1819.

BROWN
and others,
v.
GROOMBRIDGE
and others.

death, and passed to the Children, as included in the specific Bequest of Stock and Exchequer Bills. *His Honor* observed, that in the Bequest to the Wife of the Ready-money and Banknotes which the Testator should have about his Person, or in or about his usual Residence, at the time of his decease, he could contemplate only the floating Cash, which he ordinarily kept about him. That it was the Duty of those who managed the Testator's Affairs, during his Incapacity, to act as a provident Owner would do, and not to leave large Sums of Money unemployed. That there was no Equity between Legatees; and as between them, Property duly converted must be taken in the State and Character in which it is found at the death of the Testator.

The second Question was, Whether the Debts or Legacies were so charged on the specific Fund, as to be only payable out of that Fund; or whether they were not to be paid in the first instance out of the residuary Estate, and the specific Fund only to be considered as charged in aid.

Mr. *Bell*, and Mr. *Merivale*, in support of the latter Proposition cited *Waring v. Ward* (a), and a late Case in the Exchequer of *Noel v. Lord Henley*, in which the Lord Chief Baron acted upon *Waring v. Ward*. [Mr. *Shadwell* was in the Case, in the *Exchequer*, and being applied to, confirmed Mr. *Bell*'s Statement.]

The Vice-Chancellor held, that by the clear Expressions of the Will, the Debts and Legacies were imme-

1819.

BROWN
and others,
v.

GROOMBRIDGE
and others.

diately charged upon that part of the personal Estate which was comprised in the specific Gift. That *Waring v. Ward*, was the Case of a Devisee of a real Estate, who is entitled to the aid of the personal Estate.

The third Question was, Whether, under the Bequest to Children, Children born after the Testator's Wife's death were included ?

Mr. *Bell*, and Mr. *Merivale*, contended, that the Legacies were vested immediately, though payable *in futuro*; and argued, that they could not be open to let in after-born Children.

Mr. *Wyatt*, for the after-born Children.

Mr. *Beames* appeared for the Executors.

The *Vice-Chancellor* held, that all and every the Children of his Nephews and Niece lawfully begotten, would include Children born after the death of the Widow. A Question arising on the further Directions as to Costs, whether they were not included in "Testamentary Expenses," the payment of which were directed out of the specific Bequest of Stocks, &c. the *Vice-Chancellor* held, that they were not included, the word "Testamentary Expenses" being confined to the usual Charges of Probate, &c. And that the Costs must therefore be paid out of the residuary Estate.

FORTH v. Duke of NORFOLK and others.

1820.

17th January.

THE Plaintiff was a Judgment Creditor of *J. H. Wheatley*, and the Defendant, the Duke of Norfolk, was a Purchaser from *Wheatley* of an Estate, to which he was entitled in Reversion, subject to the Life of a Mr. *Hewitt*; and the Object of the Suit was, to charge the Defendant, the Duke of Norfolk, with the Plaintiff's Judgment Debt.

On the 27th and 28th Nov. 1809, W. conveyed a Reversion in Fee to A. by way of Mortgage. On the 1st Jan. 1810, E. on the part of the Duke of Norfolk, entered into a written Agreement with W. for the purchase of the Reversion.

By Indentures of the 27th and 28th November 1809, *Wheatley* conveyed this Reversion, by way of Mortgage in Fee, to *Lewis Alsop*. On the 1st January 1810, the Defendant, Mr. *Eyre*, on the part of the Duke of Norfolk, entered into a written Agreement with Mr. *Wheatley*, for the purchase of the Reversion. On the 15th March 1810, Mr. *Alsop* the Mortgagee, who was paid off by Mr. *Eyre*, joined with Mr. *Wheatley* in conveying the Estate to Mr. *Eyre*, and a part of the Purchase-money, then unpaid, was secured to Mr. *Wheatley* by a Mortgage Term, created by that Deed. The Plaintiff's Debt accrued upon a Bond, dated 16th November 1809, accompanied with a Warrant of Attorney,

On the 15th August 1810, A. the Mortgagee who was paid off by E. joined with W. in conveying the Estate to E. and a part of the Purchase-money, then unpaid, was secured to W. by a

Mortgage Term created by that Deed. W. was indebted to F. upon a Bond dated 16th November 1809, and a Warrant of Attorney of the same date was given by W. upon which Judgment was entered up and docketed on the 15th February 1810, and an Inquisition was had thereon on the 20th February 1810. On the 15th April 1810, notice was given by F. of his Judgment, the Money secured to W. by the Mortgage Term being then unpaid: Held, that F. had no Lien upon the Term in the hands of the Debtor, and consequently no Lien upon the Term in the hands of his Assignee.

1820.

FORTH
v.
Duke of
Norfolk
and others.

tiff's Notice to Mr. *Eyre* was nothing more than Notice to the Mortgagor, that a Person to whom he had granted a legal Term by way of Mortgage was indebted on Judgment; but a Judgment is, at Law, no Lien upon a legal Term; and where the Interest of the Debtor is legal, a Judgment is no Lien in Equity. Notwithstanding this Judgment, the Debtor could well assign his legal Term at his pleasure, and he has, therefore, well assigned it to the Defendant.

If there was no Lien upon the Term in the hands of the Debtor, there can be no Lien upon the Term in the hands of his Assignee.

Dismiss the Bill, with Costs (a).

(a) The Case stated for the Opinion of Mr. Serjeant *Hill*, cited in the Argument, was as follows: "*H. A. S.* became seised of an Estate in Fee-simple, subject to his Mother's Jointure, and to younger Children's Portions; he contracted to sell the same, in Lots, to different Purchasers; and after having entered into these Contracts, he conveyed it to Trustees, upon Trust, to sell and convey the Estate to the different Purchasers, and to invest a part of the Purchase-money in the Three per Cents. in the names of the Trustees, upon Trust, to indemnify the Purchasers against the Mother's Jointure, and his Brothers and Sisters Portions, and to pay the Residue to *H. A. S.*"

This Transaction has been, in part, completed; and a part of the Purchase-money has been invested, and the rest of the Purchase-money will probably be paid immediately.

Subsequent to the Trust Deed, *H. A. S.* confessed a Judgment; and a Judgment Creditor has given notice to the Trustees of the Judgment, and required them to discharge his Debt out of the Surplus Money coming to *H. A. S.* and, in all probability, he will take out execution before the Trustees part with the Money.

Your Opinion is asked on the part of the Trustees, Whether they will be safe in paying the Money in question to *H. A. S.* with respect to the Creditor of whose Judgment

they have notice, and with respect to any Judgment Creditor of which they have not notice?"

Opinion.

" I think the Trustees will not be safe in paying the Money in question to *H. A. S.* with respect to the Creditor of whose Judgment they have notice; but will be safe, in respect to any Creditor by Judgment of which they have no notice.

As to the Judgment of which the Trustees had notice, if the Purchasers have not paid the Purchase-money, I think it is incumbent on them to see the Judgment is discharged; but if they had paid it before notice, they would not have been liable, because, by the Contract and payment of the Money, the Vendor would have only been a Trustee for the Purchaser, and then the Land would, by the Statute of Frauds, 29 Car. 2, c. 3, 10, have been subject to the Judgments of the Purchaser, who, in that Case, would have been the *Cestui que Trust*, and therefore the Land would not have been subject to the Judgment entered against the Vendor; and so was the Opinion of the Court, 1 Wms. 278, 279. But though to many purposes the Estate agreed to be sold is,

from the time of the Contract, the Estate of the Purchaser, yet, I think, the Vendor is not, before payment of the Money, to be considered as a Trustee within the above 10th Section of the Statute of Frauds, for the Estate continues his at Law; and even in Equity he has a right to detain it until payment of the Purchase-money; and therefore, till that time, I think it continues subject to the Judgments of the Vendors. And in the Case, 1 Wms. 278, (on which the Opinion of the Court was given,) it is stated, that the Judgment was after payment of the Purchase-money by the Person who contracted for the Purchase, though before the conveyance to him, and the Opinion is founded on its being so stated; therefore, I think, the Judgment Creditor hath a right to so much of the Purchase-money as is sufficient to satisfy his Judgment; and the Trustees, having notice of his right, ought to pay it, if the Money is in their hands.

As to the Judgments (if any) of which the Trustees have no notice, if any such are prior to the Deed of Trust, they may be extended on the Estate, notwithstanding the Sale, by the Trustees; and though they should appear to

1820.

FORTH
v.
Duke of
NORFOLK
and others.

1820.

FORTH
v.
Duke of
NORFOLK
and others.

be subsequent to the Deed of Trust, yet, as the Surplus of the Estate is to be vested in the Three per Cents. for the benefit of the Vendor, he has still an equitable Interest in the Land, which I think will be bound by the Judgment; but if the Trustees have no notice of Judgments subsequent to the Deed of Trust, I think a Court of Equity will not make them pay the Money over again, if they apply it according to the Deed of Trust; because I think Equity, in the Case of a Judgment Creditor, and a *bond fide* Purchaser, or a Trustee, without notice, will not interpose on either side, but leave the Law to take its course; and therefore, as to such Judgments (if any) as are subsequent to the Deed of Trust, and of which there is no notice, I think neither the Purchasers nor the Trustees are bound to take notice of them,

nor are answerable for the application of the Money to those who appear to them to be entitled to it. But though this is my Opinion, yet I think it safest for search to be made for Judgments; and if any others should appear, whether before or subsequent to the Deed of Trust, for the Trustees to insist on *H. A. S.*'s consent to the payment of them out of the Surplus Money; or else, if the Creditors by Judgment insist upon a right to be paid, not to part with it, without the Directions of the Court; and if the Creditors and *H. A. S.* will not agree, nor file a Bill against the Trustees and proper Parties, I think the Trustees should file a Bill of Interpleader, stating the Case, and pay the Money into Court; and pray, by the Bill, that they may be allowed their Costs thereout, and the Residue to be disposed of as the Court shall direct.

Lincoln's-Inn,
11th June, 1793.

Geo. Hill."

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT OF LEGATEES.

See tit. LEGACIES, 2.

ACCOUNT.

See tit. PARTNERS.—TOLL.

Bill, for an account, will lie by the principal against an agent employed to sell goods for him. [*Mackenzie v. Johnston* and others] - - 373

ACCUMULATION.

The statute 39 & 40 Geo. III, c. 98, prevents an accumulation, directed by will, of interest, during the minority of an unborn child: the excess forms part of the residue. [*Halcy v. Bannister*] - - - 275

ADEMPION OF LEGACY.

See tit. LEGACY, 7.

ADJOURNMENT OF CAUSE.

See tit. PRACTICE, 3.

AFFIDAVITS IN BANKRUPTCY.

See tit. BANKRUPTCY, 2.

AGENT.

See tit. ACCOUNT.

AMENDMENT OF BILL.

See tit. PRACTICE, 10. 15. 19.

ANCIENT MILLS.

See tit. TOLL.

ANSWER.

See tit. EXCEPTIONS, 2.

1. In schedules, annexed to an answer, there was a material error

which was only discovered on taking an account before the Master: upon petition and affidavit, the defendants were allowed to put in supplemental schedules.

[*French v. Myles and others*] 404

2. On a bill, stating a partnership and praying an account, the defendant by his answer denied the partnership, and refused to set forth the account; but held, if he answers, he must answer fully, and that he should have pleaded. [— *v. Harrison*] - - - - - 252

APPORTIONMENT OF RENT.

See tit. VENDOR AND VENDEE, 2.

ASSIGNEES OF BANKRUPT.

See tit. VENDOR AND VENDEE, 3.

ATTACHMENT.

See tit. PRACTICE, 13.

AUCTIONEER.

Bill against vendee and auctioneer, praying a specific performance, and that the deposit might be paid into court; the auctioneer admitted the deposit to be in his hands, and stated his claims upon it. On motion, he was ordered to pay in the deposit, after retaining the amount of his claims, and without prejudice to any question as to the

money retained. [*Yates v. Farebrother and another*] - - - 239

BANKRUPTCY.

See tit. COSTS, 9.—EVIDENCE, 1.—PRACTICE, 10.—PURCHASER, 9.

1. Query, Whether an insurance broker can be made a bankrupt. [*Ex parte Stevens*] - - - 256
2. Affidavits, filed in support of a petition to supersede a commission and stay a certificate, need not be answered if founded only on information and belief, unless it is stated in the affidavit from whom the information was received, and that such person refuses to make an affidavit. [*Ibid.*]
3. When a petition is to supersede a commission for collusion, and stay a certificate, and there are suspicious circumstances, costs will not be given though the petition fails. [*Ibid.*]
4. Commission cannot be superseded, with the consent of the petitioning creditor, before the first meeting for the proof of debts. [*Ex parte Law*] - - - - - 279
5. Bankrupt may petition to supersede his commission on the ground that he was no trader, though he has obtained his certificate under it; if upon an action by the assignees against a creditor, their title is successfully resisted, and the commission becomes inoperative. [*Ex parte Bass*] - - - - 270

6. On a petition to expunge a proof, founded on an affidavit of a creditor, who died before the proof was made, the commissioners were directed to review the proof, although two dividends had been paid. [*Ex parte Bridges, in re Moorhouse*] - - - - - 209
7. If a commission be obtained by collusion with the bankrupt, but assignees are chosen, who are not under the control of the bankrupt, and the commission is fairly proceeding for the benefit of the creditors, it will not be superseded. [*Ex parte Warwick, in re Cooper*] 262
8. Bankrupt obtaining leave to surrender after the proper time for surrendering is expired, pays the costs. [*Ex parte Carter*] - 394
9. It is not of course to refer to the Master a bill of costs, up to the choice of assignees, already taxed by the commissioners. Particular objections must be stated. [*Ex parte Salton, in re Brereton*] 395
10. On a separate commission against one partner, the assignees took possession of the partnership property, and were about to sell it. Injunction, on filing of Bill and affidavit, granted to restrain the sale. [*Allen v. Kilbre*] - - - - - 464
11. A solvent partner, winding up the partnership concerns, is entitled to prove under the commission against the bankrupt partners, the share of the loss or deficiency which each partner ought to have borne as a

debt against his separate estate.

[*Ex parte Watson*] - - - 477

12. Where a copyhold is sold under a commission of bankruptcy, a good title is made by a bargain and sale from the commissioners to the purchaser. [*Ex parte Holland*] 483

BIDDINGS.

See tit. PRACTICE, 16. 24.

BILL TO PERPETUATE THE TESTIMONY OF WITNESSES.

See tit. DEMURRER, 1.

CERTIFICATE.

See tit. BANKRUPTCY, 3.

CHARITY.

1. In a suit by the Attorney General, respecting a breach of trust as to property belonging to a charity, the court will permit a reference if the Attorney General consents; but not if the question is upon the construction of a will. [*Attorney General v. Fea*] - - - - 274
2. Where, in respect of the increased rents of a charity estate, it is referred to a Master to approve of a scheme for their future application, and he recommends an augmentation of a salary given by the will of the founder, he is not, with respect to the augmentation, strictly confined to the provisions of the

will as to the original salary, but may engraft upon it a new condition in furtherance of the testator's general intention. [*Ex parte Lane* and others, in the matter of *Kingsbridge School*] - - - - - 479

COMMISSION ABROAD TO EXAMINE WITNESSES.

See tit. PRACTICE, 26.

COMPOSITION REAL.

A deed, creating a composition real, will not be presumed from payments for two hundred years of a sum in lieu of tithes. [*Fistcourt v. Kingscote*] - - - - - 140

CONVERSION OUT AND OUT.

See tit. DEVISES AND BEQUESTS, 10.

COPYHOLD.

See tit. BANKRUPTCY, 12.—VENDOR AND VENDEE.

COSTS.

See tit. BANKRUPTCY, 3, 8, 9.—NEW TRIAL.—PRACTICE, 4, 7, 8.—VENDOR AND VENDEE, 4.

1. Information against several, praying relief as to some of the defendants, and a discovery only as to one, that defendant, on answering, moved as of course, and obtained an order for his costs,

the Bill being said to be only for discovery against him; but such order was, on motion, discharged. [*Attorney General v. Burch and others*] - - - - - 178

2. Where the plaintiff's bill is ancillary to his legal title, and he fails at law, he must pay costs in equity. [*Meyrick v. Wishaw*] 272
3. Where a plaintiff is bound to give security for costs, each defendant, employing a separate clerk in court, is entitled to a separate bond for 40*l.* but the plaintiff is only bound to pay one 40*l.* [*Lowndes v. Robertson and others*] 465
4. On a decree for dismissal of bill with costs, the same was prefaced with a direction for the payment of costs on some motions in the cause. [*Wild v. Hobson*] - 49
5. Motion that defendants, whose title to the trust funds was in question in the cause, might have advanced to them a sum of money to answer the expense of executing a commission in America, refused. [*Tillotson v. Hargreaves*] 172
6. On a motion to dismiss, an undertaking was given to speed, but by a mistake of the Registrar he took no note of the undertaking to speed, and the order to dismiss was drawn up. On affidavit of the facts the mistake was remedied, but the plaintiff was directed to pay the costs of drawing up the

order, and of the present motion.
[*Hibberson v. Cooke*] . . . 248

7. *Cestuis que trust*, bringing an action in trustee's name, ordered to give security for costs. [*Annesley v. Sir John Simeon*] . . . 390
8. Solicitor has no lien, on a fund decreed to his client, beyond his costs in that suit; *semble*, he cannot claim the amount of other costs due to him in other suits. [*Lann v. Church*] . . . 391
9. A petition for an order to tax a solicitor's bill of costs, in bankruptcy, up to the choice of assignees, after it has been taxed by the commissioners, will not be granted, unless specific errors are stated. [*Ex parte Brereton, in re Sutton*]

479

COVENANT.

See tit. SATISFACTION OF COVENANT.

CROSS-BILL.

See tit. DEMURRER, 2.—PRACTICE, 27.

CROWN.

See tit. TRAVERSE.

CUSTOM.

See tit. TOLL.

DEBTS.

See tit. DEVISES AND BEQUESTS, 10.
—TRADERS.

DECREE.

See tit. PRACTICE, 15.

DEMURRER.

See tit. BILL TO PERPETUATE TESTIMONY.—VENDOR AND VENDEE.

1. On demurrer, held, that a supplemental bill to perpetuate the testimony of witnesses, on the ground of facts discovered since the filing of the original bill, but not stating what those facts were, could not be sustained. [*Knight and others v. Knight*] 1
2. On a bill being filed in the Exchequer for tithes, the defendant filed a cross-bill in the Court of Chancery for a discovery of the plaintiff's title to the tithes, and whether he had not conveyed them away; and on demurrer, it was held, that the defendant was not entitled to a discovery of the plaintiff's title to the tithes, but was entitled to a discovery whether he had conveyed them away. A doubt was entertained, whether a cross-bill could be filed in Chancery when the original bill was in the Court of Exchequer; but the defendant having answered part of the bill, was considered as precluded from raising the objection. [*Glegg v. Legh*] 193
3. On a demurrer by a witness to an interrogatory, the same was overruled, it being too general; but leave was given to put in a written

demurrer on a re-examination.
[*Morgan v. Shaw*] - - - - 54

DEPOSIT.

See tit. AUCTIONEER.

DEPOSITIONS.

See tit. PRACTICE, 30.

DEVISES AND BEQUESTS.

See tit. DIVIDENDS.—EXECUTORS.
—EXEMPTION OF PERSONAL
ESTATES FROM DEBTS.—MORT-
GAGOR & MORTGAGEE, 2.—SA-
TISFACTION OF COVENANT.—
SURVIVORSHIP.

1. Devise to M. J. and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her and their heirs, as tenants in common. Held, that M. J. took an estate for life with remainder to her children, as tenants in common in fee. [*Jeffery and others v. Honeywood*] - - - - - 398
2. Held, upon the construction of the whole will, that an estate-tail passed. Where the literal force of expressions differs in a will, it is a true rule to seek the intention of the deviser, rather in a consistent and rational purpose, than in a purpose inconsistent and irrational. *Query*, where a deviser has expressed an intent to exclude A. from the descent, whether a court

will, in order to effectuate the general intent, give an estate which may descend to A.? [*Jenkins v. Herries and others*] - - - 67

3. Bequest to wife of real and personal estate for life; and after her decease, a gift of various legacies; and a devise of all the rest; residue and remainder of real and personal estate to testator's nephews. Held, that the legacies were a charge on the real estate. [*Bench and others v. Biles*] - - - - - 187

4. Bequest to A. T. of interest and dividends of personal property for life; and then to be equally divided amongst her three children, or such of them as shall be living at her death. The children died in the life-time of the tenant for life. Held, that they took vested interests, transmissible to their representatives. [*Sturges v. Pearson*] - - - - - 411

5. Testator devised land to his children, being infants, "the same to be sold when the trustees and executors of his will shall see proper to dispose of it; and the money arising out of the lands and tenements to be equally and severally divided among my above-named children." Held, that the trustees had a power to sell the fee, and to give effectual receipts to the purchasers. [*Sowarsby and others v. Lacy*] - - - - - 143

6. Bequest to a married woman of a sum for her sole and separate use and benefit, &c. and afterwards a

- bequest of the residus for her own use and benefit. The residus held not to be separate estate of the wife. [*Wills v. Sayers*] - - - - 409
7. Heritable bonds, together with English securities, were given on a loan of money to a domiciled Englishman. Held, that a will, disposing of the money due on such securities, was effectual; and that the heir at law of the testator had no claim in respect of the heritable bonds. [*Dutchess Dowager of Buccleuch, &c. and another v. Hoare and others*] - - - - 467
8. Devise of lands to testator's wife for life, with a direction, that after her death the same should be sold, and the produce divided among his nephews and nieces; the children of such of them as should be then dead, to stand in the place of their father and mother deceased. A niece and nephew died in the testator's life-time, leaving children. Held, that the benefit of the bequest extended only to such of the testator's nephews and nieces as were *in esse* at the testator's death, and to the children of such of them as should die after the testator, and before the testator's wife. [*Thornhill v. Thornhill*] - - - - 377
9. Bequest to M. S. of "2,000*l.* stock of my four per cent. and in case of her death, the said 2,000*l.* stock shall then be equally divided between her children." Held, that M. S. being alive at the death of the testator, took absolutely. [*Slade v. Milner*] - - - - 144
10. In order to exempt the personal estate from the payment of debts and funeral expenses, there must be a clear intention, either expressed, or to be extracted from the whole will, that the real estate is to be applied as the primary fund for those purposes. [*Greene v. Greene*] - - - - 148
11. Devise to M. J. and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her and their heirs, as tenants in common. Held, that M. J. took an estate for life, with remainder to her children, as tenants in common in fee. [*Jeffery v. Honeywood*] 398
12. Where land is devised to be sold, and there is a partial failure of the purpose of the devisor as to the price, but there remains some purpose of the devisor to be answered by a sale, there the heir takes the benefit of the partial failure as money, and not as land. But if there be a total failure of the purposes of the devisor as to the price, his intention as to a sale is to be considered as not applying to the events which have happened, and the heir takes the land as real estate. [*Smith v. Claxton and others*] - - - - 484
13. The testator gave to his wife all his ready-money and banknotes which he should have about his

person, or at his residence, at his death. He gave specifically to others his exchequer bills, stock, &c. He became insane two years before his death, and during that time two large sums of money, amounting to near 3,000*l.* which had been paid at his house, were laid out for him in stock and exchequer bills: this was held a due conversion of the money; and that the specific legatees of the stock and exchequer bills were entitled to it. The testator gives specifically parts of his personal estate, chargeable with his debts and legacies, and gives the residue of his personal estate to another: the debts and legacies fall upon the specific gift, and not upon the residue. It was held also, that a gift to all and every the children of nephews and nieces, lawfully begotten, includes after-born children. [*Browne and others v. Groombridge and others*] - - 495

DISCOVERY, BILL OF.

See tit. COSTS, 1.—DEMURRER, 2.

DISMISSAL OF BILL.

See tit. PRACTICE, 1, 2. 8. 12. 23. 28.

DIVIDENDS.

Where will directed dividends to be paid to tenant for life, at Lady-day and Michaelmas-day, the money

was ordered to be laid out in the three per cents. reduced, the dividends on such stock being payable at that time. [*Caldecott and others v. Caldecott and others*] - - 189

DOUBLE PLEA.

See tit. PLEA.

DOWER.

See tit. ELECTION.

ELECTION.

1. Devise of real and personal estate to trustees, in trust, as to a certain freehold messuage, for testator's wife for life, if she should so long continue his widow; and the trustees to furnish the same; and his plate, linen, &c. for her absolute use and benefit; and out of the rents, income, and annual profits of his, testator's, real and personal estate, to pay her an annuity of 100*l.* for her life; and in case she should be *enscint* with any child, a further annuity of 50*l.* during the minority of such child, for its maintenance; and if the child should be a son, and attain twenty-one, he gave a certain farm to him and his heirs, subject to the annuity of 100*l.* which was thereafter to be an exclusive charge upon such farm; if the child proved to be a daughter, she to have an annuity of 100*l.* for her life, and after her decease 2,000*l.* to be raised and

- paid to her children ; and upon further trust, to pay his daughter, N. V. an annuity of 100*l.* for her life, and to permit her to use, occupy, and enjoy a certain messuage for her life, and after her decease to raise 2,000*l.* for her children ; and after giving legacies to his other children, the testator gave the residue of his real and personal estate amongst his children, and gave the usual power of sale to his trustees. Held, that the wife, claiming dower, must be put to an election. [*Brain v. Miall* and others] 119
2. The defendant agreed to take a lease from the plaintiff, and was let into possession. The plaintiff filed a bill for a specific performance of the agreement, and brought an action for use and occupation. It was referred to the Master, to see if the defendant was proceeding at law, and in equity for the same matter : he reported in the affirmative, and an exception to his report was overruled. [*Carrick v. Young*] - - - - - 437

EQUITABLE MORTGAGE.

See tit. MORTGAGOR AND MORTGAGE, 1.

EVIDENCE.

See tit. COMPOSITION REAL.—DEMURRER, 3.—NEW TRIAL.—PRACTICE, 29, 30.

1. Where there are infant defendants, they will not be concluded as

- to the question of bankruptcy, by the production of the commission, &c. under the 49 G. 3, c. 121, s. 11, although no notice has been given on their part of an intention to dispute the commission. [*Bell* and another v. *Tinney* and others] 372
2. If the bill states a defendant to be out of the jurisdiction, and it is admitted by infant defendants, proof of the fact is nevertheless necessary. [*Wilkinson v. Beal* and others] - - - - - 408
3. A. mortgages to B., C. is the only witness to such mortgage. B. dies and bequeaths to the wife of C. and also to others the mortgage. C. and wife, and the others, file a bill of foreclosure against A. and subsequent incumbrancers. Proof : C.'s hand writing by a third person was held sufficient proof of the execution of the mortgage made by A. to B. [*Inman v. Parsons*] 271
4. On an affidavit of the incapacity of a witness to attend the examiner, an order was made that the examiner should attend upon the witness to take his examination. [*Anonymous*] - - - - - 463

EXCEPTIONS.

See tit. PRACTICE, 15.

1. On appeal to the House of Lords, it was held, that if the Master reports that certain admissions were made before him, and exceptions are taken to such statements of

admissions in the report, the court cannot allow the exceptions without consulting the Master as to the fact of such admissions. [*East India Company v. Keighley*] - 16

2. On exceptions, held, that the defendant having by his answer admitted a profit of 20,000*l.* on certain contracts, and the decree declaring him answerable for the same, as a trustee for the plaintiffs, and for any profit he might be found to have made. The Master, on taking the accounts between the parties, (which were so taken at the instance of the plaintiffs, in hopes of proving that he had received a larger profit than the 20,000*l.*), was not authorized to report that the defendant, instead of being indebted to the plaintiffs to the amount of 20,000*l.* in respect of profits received by him, was a creditor on the plaintiffs to the amount of 67,000*l.*; no evidence being admissible to contradict the answer of the defendant. [*Ibid.*]

3. If exceptions taken to the report of a good title are overruled, other objections to the title cannot be made; but if exceptions are allowed, and a new abstract of title is delivered, further objections may be brought in. [*Brook v. ———*]

212

4. On a petition for leave to except to the Master's report of costs, leave was granted upon paying the

taxed costs into court. [*Ex parte Leigh*] - - - - - 394

5. Amendment of bill, after exceptions, is a waiver of the same. There should be a special motion for liberty to amend, without prejudice to the exceptions. [*De la Torre v. Bernales*] - - - 396

EXECUTORS.

See tit. FRAUD, 2.

Executors have only power to sell real estate where expressly given, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. [*Bentham and another v. Wiltshire*] - - - - - 44

EXEMPTION OF PERSONAL ESTATE FROM DEBTS.

In order to exempt the personal estate from the payment of debts and funeral expences, there must be a clear intention, either expressed, or to be extracted from the whole will, that the real estate is to be applied as the primary fund for those purposes. [*Greene v. Greene*] - - - - - 148

FEME COVERT.

See tit. LEGACY, 5.

FORECLOSURE.

See tit. PARTIES.

FRAUD.

1. Trustees, in trust, to raise 35,000*l.*

- grant an annuity, secured by a term of years, for 5,000*l.* part of the 35,000*l.* and the title-deeds remain in their hands; they afterwards make a mortgage, without informing the mortgagee of the first incumbrance. Held, that the annuitant was not to be postponed to the second incumbrancer, by reason that the trustees retained the title-deeds. [*Harper v. Faulder and others.*] - - - - - 129
2. Bankers, the agents of executors, and authorized by them to receive certain assets, remitting the amount to the executors in the course of their duty as agents, and afterwards applying the assets, when received, in payment of the amount of such remittances, are not responsible in respect of a misapplication by the executors, they not being privy to any intention of such misapplication. [*Keane and others v. Roberts and others.*] - - - - 332
- to the Master, to enquire, whether it would be for the benefit of infants, that money in executors hands should be laid out on mortgage; the course of the court being, to order it to be laid out in the three per cent. consols. [*Norbury v. Norbury*] - - - - 191
2. Infant trustee refusing to convey after an order for that purpose, another order was made that he should convey within a week after service; and the court suggested, that if he did not obey that order, a motion should be made for his commitment, unless cause. [*In re Beech.*] - - - - - 128
3. An infant of the age of seventeen appoints a guardian by deed: this does not preclude an application to the court to appoint a guardian. [*Curtis v. Rippon*] - - - 462
4. A reference was made to the Master, on a legatees bill, to compute how much stock it would be necessary to set apart to answer the legatees. The Master made his report, but before any order was made on the report, one of the infant legatees attained twenty-one and petitioned for his legacy. Stock had fallen since the report; and it was held, that he was entitled to so much stock as at the time of the petition would answer the legacy. [*Rock v. Hardman*] 254
5. A bill, filed in the name of an infant, may be dismissed by him when he comes of age; but he cannot make the *prochein amy* pay

GUARDIAN.

See tit. INFANT, 3.

HERITABLE BONDS.

See tit. DEVISES AND BEQUESTS, 8.

IMPERTINENCE.

See tit. INJUNCTION, 1.

INFANT.

See tit. EVIDENCE, 1.—MAINTENANCE.—PRACTICE, 5. 18.

1. Court will not order a reference

the costs, unless it be established that the bill was improperly filed. [*Anonymous*] - - - - 461

INJUNCTION.

See tit. BANKRUPTCY, 10.—PRACTICE, 17.

1. On a motion to dissolve an injunction, (on the coming in of the answer, a reference of the answer for impertinence was shown for cause against dissolving the same, and the party was put upon the terms of obtaining the report within four days. The report was not made within the four days, and the injunction was dissolved. Afterwards there was a report, that the answer was impertinent, and upon that report a motion was made to revive the injunction, but it was held, that such a motion could not be sustained. [*Dansey v. Browne*] - - - - 237
2. A motion *nisi* being made at the last seat, after Trinity Term, to dissolve an injunction which had been obtained to restrain proceedings at law, a day was appointed during the petitions to show cause. [*Fielding v. Capes*] - - - 393
3. A motion was made for an injunction to stay proceedings at law, on merits confessed by the answer. The answer admitted the written agreement charged in the bill, but alleged the true intention of the parties was otherwise. Held, that

on such an application the answer was evidence for the defendant, as to all facts to which other testimony could be received; that other evidence could not be received to contradict the parol agreement, and therefore the answer could have no weight for that purpose. [*Bott v. Birch*] - 255

INQUISITION.

See tit. TRAVERSE.

ISSUE.

See tit. NEW TRIAL.

1. On a motion for a receiver, an issue was directed; and that the plaintiff and a defendant should be examined upon the trial of the issue. The defendants afterwards refused to proceed on the issue; and it was held, that they could not be compelled to proceed. [*Gardiner v. Rowe and others*] 236
2. If an issue be directed, but is not tried, nor any notice of trial given, it will be directed to be tried at the next assizes, or taken *pro confesso*. [*Anonymous*] - - - 455

JUDGMENT CREDITOR.

On the 27th and 28th November 1809, W. conveyed a reversion in fee to A. On the 1st January 1810, E. on the part of the Duke

of N. entered into a written agreement with W. for the purchase of the reversion. On the 15th August 1810, A. the mortgagee, who was paid off by E., joined with W. in conveying the estate to E. and a part of the purchase-money, then unpaid, was secured to W. by a mortgage term, created by that deed. W. was indebted to F. on a bond, dated 16th November 1809, and a warrant of attorney of the same date was given by W., upon which, judgment was entered up and docketted on the 15th February 1810, and an inquisition had thereon on the 20th February 1810. On the 15th April 1810, notice was given by F. of his judgment, the money secured to W. by the mortgage term being then unpaid. Held, that F. had no lien upon the term in the hands of the debtor, and consequently no lien upon the term in the hands of his assignee. [*Forth v. Duke of Norfolk*] - - - - - 506

LAND-CHEAP.

Bill held to lie in respect of land-
cheap, claimed by custom in the
Borough of *Malden*, in *Essex*.
[*Mayor, &c. of Malden v. Coates*]
447

LEGACY.

See DEVISES AND BEQUESTS, 3.

1. Bequest to M. S. of 2,000 l. stock
VOL. IV.

of my four per cent., "and in case of her death, the said 2,000 l. stock shall then be equally divided between her children." Held, that M. S. being living at the death of the testator, took absolutely; and that the words, "in case of her death," referred to her death before the testator. [*Slade v. Milner and others*] - - - - - 144

2. The testator directs his executors and trustees, after payment of his debts and funeral expences, "in the next place" to pay three pecuniary legacies; "and afterwards, to raise and set apart" three other legacies. There is no priority between the two sets of legatees, but in case of a deficiency of assets, each must abate equally. [*Beeston v. Booth and others*] - - 161
3. Upon exceptions, an unconditional legacy, given by a third testamentary paper, was held to be a substitution of a conditional legacy to the same amount given by the first testamentary paper. [*Attorney General v. Harley and another*] 263
4. Legacies to C. "and to the heir of his body,"—to M. "to be secured to her and the heirs of her body,"—to F. "and to her issue,"—are absolute legacies; but on a legacy to S. "and to her heirs, (say children)," it was held, that S. was only entitled for life. [*Crawford and others v. Trotter and others*] - - - - - 361
5. Legacy to a married woman "for
M M

her sole and separate use and benefit, &c.;" and afterwards, a bequest of the residue "for her own use and benefit:" the residue held not to be separate estate. [*Willis v. Sayers* - - - - - 409]

6. A gift by testator in his life-time to legatees, after a will giving them legacies, held to be part satisfaction of the legacies, upon evidence of the intention of the testator to that effect. [*Thellusson and others v. Woodford and others*] - 420
7. Testatrix, by a codicil to her will, bequeathed to W. H. and M. H. an arrear of interest, due on a mortgage, amounting to 600*l.* as she computed the same. After the making of the codicil she lived eleven years, and received interest from the mortgagor to the amount of 648*l.* On a reference to the Master, he found that 646*l.* 8*s.* 3*d.* was due to the testatrix for interest when she made her codicil; and that a sum to that amount was due to her for interest when she died; and, upon the affidavit of F. he found that the interest, received by the testatrix after the making of her codicil, was so received in respect of interest as it accrued due after the making of the codicil, leaving outstanding the arrear of interest due when she made the codicil. Held, that the legacy was not reduced by the receipt of interest subsequent to the making of the codicil. [*Graves v. Hughes*] - - - - - 381

LIEN.

See tit. JUDGMENT CREDITOR.

LIEN FOR COSTS.

See tit. COSTS, 8.

LOSS.

A person gratuitously acting in the collection of debts, under a trust deed, mixed the money he received with his own, by placing it in his bankers hands in his own name, and upon his own general account. The bankers were in the habit of paying him an interest of 3 per cent. upon money in their hands. He informed the trustees that the money was in bank, but did not state with whom, nor that it was mixed with his own monies, nor that an interest was to be paid upon it. The bankers having failed, he is answerable for the loss upon the trust money. [*Massey v. Banner*]

413

MAINTENANCE.

Wherever children born, and to be born, have a common interest in a fund, the fund, if necessary, may be applied for the maintenance of the children. If the father is not of ability, the court will allow maintenance for the children, although the mother has a competent separate estate. [*Haley and others v. Bannister and others*]

275

MISTAKE IN ANSWER.*See tit. ANSWER.—EXCEPTIONS, 2.***MODUS.***See tit. NEW TRIAL.***MONEY, PAYMENT OF, OUT OF COURT.***See tit. PRACTICE, 2.***MORTGAGOR AND MORTGAGEE.***See tit. FRAUD, 1.—PARTIES TO BILL.*

1. A parol agreement to deposit a lease, when granted as a security for a sum advanced, does not constitute an equitable mortgage. [*Ex parte Combe*, and another *in re Beavan*] - - - - - 249
2. An estate, which a testator holds as mortgagee, will not pass under a general devise of all lands to uses in strict settlement, although the testator at the making of his will had obtained a decree for an account in a bill of foreclosure; for the estate does not lose the quality of a mortgage until the final order of foreclosure. A devise of all lands, which the testator may hold in mortgage at his death, will not pass an estate which was held on mortgage by the testator at the making of his will, but as to which he had obtained a final order of foreclosure before his death. [*Thompson v. Grant*] 438

3. Mortgagor agrees to give a second mortgage for what is due for principal and compound interest on the first mortgage. *Query*, if second mortgage void, as being usurious. [*Sackett v. Bassett*] 58
4. On a bill, against a mortgagee in possession to redeem, if the interest has never been in arrear, and the annual rents exceeded the amount of the annual interest, the Master will be directed to make rests; but the court sometimes relaxes the rule, when the interest is in arrear, when the mortgagee takes possession. [*Shephard v. Elliot*] 254

NEW TRIAL.

On an issue, directed to ascertain whether a modus was payable in respect of a certain part of a farm, a verdict was found for the defendant in equity. A new trial being moved for, the following points were determined: 1st, That the issue was irregular, it being double in its nature, applying first to the farm, which the modus was intended to cover; next, to the payment contended for as a modus. 2dly, That the rejection of evidence of a lease in 1704 was immaterial, as it only carried back some few years farther the fact of payments, which had been established for a period sufficiently long by other evidence. And *semble*, that reputation in this case was

not evidence, and therefore the lease was not, it being in effect the declaration of the lessor of his own right. 3dly, Though the judge directed the jury to find specially, that *Fatting Park* was an addition to the farm from the old common, (if they were of that opinion,) and they, by the general verdict, found it was an ancient part of the farm, there was no reason to be dissatisfied with their conclusion, there being only one witness against that conclusion, whose evidence was obscure, and opposed by other evidence; and it was to be presumed, in the absence of opposing testimony, that the inclosure had been lawfully made, and so as to give the land by way of substitution for the right of common; and though the verdict might be wrong in form, yet it was right in substance, and the court would not send it back for a matter of form. 4thly, That the validity of a farm modus is not to be tried by a comparison of value with the whole tithe at any remote period; and that ancient documents cannot prevail against all proof of usage, unless they were consistent with each other, and excluded not the probability, but the possibility of the modus. 5thly, That reputation is admissible in cases of private right, where a class or district of persons was concerned; and is evidence as to a parochial modus, but not as

to a farm modus; or to support a prescriptive right, except as to a right of way. 6thly, Proof of a fixed payment for a farm during a long period, even without mention of a modus, is evidence of a modus. 7thly, Costs are given when a finding at law is confirmed. [*White v. Lisle and others*] - - - 214

NEXT FRIEND.

See tit. PRACTICE, 5.—INFANT, 5.

PARTIES TO BILL.

See tit. AUCTIONEER.

On a bill to foreclose by W. it appeared that the mortgage was made to H. who was a trustee for W. by whom the mortgage money was advanced. Held, that H. must be a party to the suit. [*Wood v. Williams*] - - - - - 186

PARTNERS.

One partner may file a bill against his copartner for an account, although he does not pray by his bill a dissolution of the partnership. [*Harrison v. Armitage*] - - 143

PETITION.

See tit. PRACTICE, 2.

PLEA.

See PRACTICE, 34.

On a special application, the court, where circumstances require it, will give the defendants leave to plead double. [*Gibson and another v. Whitehead and others*] - 241

PRACTICE.

1. The only answer that can be given, on a motion to dismiss, is an undertaking to speed the cause. [*Steadman v. Ellis*] - - - - - 240
2. There must be a petition where a gross sum is sought to be paid out of court; but where only interest on a gross sum is applied for out of court, a motion is sufficient [*Anonymous*] - - - - - 228
3. Cause will not be adjourned when near a hearing, because a cross-bill has been filed, which has not been answered. [*Coates and another v. Pearson*] - - - - - 262
4. On replication, after notice of motion to dismiss, the motion is not sustainable; but the defendant is entitled to costs. [*Spurrier v. Bennett*] - - - - - 39
5. The next friend of an infant plaintiff cannot withdraw himself from that situation, without a reference to the Master. [*Melling v. Melling*] - - - - - 261
6. On the motion of the defendant, before answer, who submitted to pay the plaintiff's full demand, a reference was made to the Master to ascertain what was due to the plaintiff for principal, interest and costs, in respect of the legacy claimed by the bill: the same to be paid within a given period; and if not paid, the plaintiff's costs of the application, and of the Master's report, to be taxed and paid by the defendant; and the plaintiff to be at liberty to proceed in the cause. [*Boys et Ux. v. Ford and another*] - - - - - 40
7. On a decree for the dismissal of a bill with costs, the same was prefaced with a direction for the payment of costs of some motions in the cause. [*Wild v. Hobson*] 49
8. Motion, by some of several plaintiffs, to have bill dismissed against them with costs, granted on terms. [*Holkirk v. Holkirk*] - - - 50
9. A cause being set down, and a subpoena to hear judgment issued before publication had passed, the subpoena was ordered to be quashed, and the cause struck out of the paper. [*Ellis v. King*] - - 126
10. On the bankruptcy of the plaintiff the defendant may move, that the plaintiff shall procure his assignees to file a supplemental bill; or that the bill shall stand dismissed without costs. [*Wheeler v. Makins*] 171
11. Motion that defendants, whose title to certain trust funds was in question in the cause, might have advanced to them a sum of money to answer the expense of executing a commission in America, refused. [*Lister v. Crook and others*] - 172
12. Order to dismiss a bill, not served before the bill is amended, is a nullity, and it is not necessary to move to discharge it. [*Tanner v. Dean*] - - - - - 176
13. An attachment must be entered in the Registrar's book before it is issued. [*Smith v. Thompson*] 179

14. The Master may by his report state the reason why he has disallowed a claim, although the decree does not direct him to state any special matter. [*Champernowne v. Scott*] - - - - - 209
15. A plaintiff moving, as of course, to amend his bill, after he has taken exceptions to the answer, waives his exceptions; he must move specially for liberty to amend, without prejudice to the exceptions. [*De La Torre v. Bernales*] - - - 396
16. Relief may be had, under a general prayer in a bill for relief, without any particular prayer. [*Wilkinson v. Beal*] - - - - - 408
17. Plaintiff brings an action against the defendant, and files a bill in the Court of Chancery for a commission to examine witnesses abroad. The defendant at law files a bill in the Exchequer against the plaintiff at law for a discovery, and obtains an injunction, for want of an answer, to stay proceedings at law. The plaintiff at law afterwards moves in Chancery for a Commission abroad to examine witnesses. Held, that the application was restrained by the injunction in the Exchequer, it being in substance a proceeding at law. [*Novaes and another v. Dorrien*] - - - 362
18. Where there is a devise of real estate to an infant, subject to the payment of debts, the court will not direct a sale on the hearing of the cause, though the insufficiency of the personal estate is admitted; nor until the Master has made a separate report. [*Birch v. Glover*] 376
19. On a motion for leave to withdraw a replication and rules to produce witnesses, and to amend, notice must be given, and a special case made. [*Lord Kilcoucey v. Ley*] - - - - - 212
20. When a demurrer is struck out of the paper for want of appearance, it cannot be set down again without an order for that purpose on motion. [*Tolson v. Lord Fitzwilliam*] - - - - - 405
21. An order to the Registrar of the Ecclesiastical Court to deliver a will to the Solicitor or agent of the plaintiff, that it may be produced on the hearing of the cause, must be directed to the Registrar of the court; and the security for the return of the will must be approved by the Master. [*Qualey v. Qualey*] - - - - - 213
22. All applications to rectify a decree must be by petition. [*Grey v. Dickenson*] - - - - - 464
23. Biddings will not be opened, unless an advance is offered of, at least, 40*l.* [*Farlow v. Weildon*] 400
24. A defendant, though he has become bankrupt, may move to dismiss. [*Rhode v. Spear*] - - - 51
25. If one, who has moved to open biddings, does not draw up his order and pay the deposit, another person may move to open the biddings, upon notice to the party

- who moved before to open the biddings. [*Gibbons v. Howell*] 52
26. A commission abroad to examine witnesses cannot be obtained, unless the defendant is in contempt, or has answered. [*King v. Allen*] 247
27. Cause will not be adjourned, when near a hearing, because a cross-bill has been filed which has not been answered. [*Coates v. Pearson*] - - - - - 262
28. After a motion to dismiss, and an undertaking to speed, the plaintiff cannot move, as of course, to amend, but there must be a special application. [*Myers v. —*] 268
29. Cause called on for the purpose of proving a will, the proper officer having come up from York with the original for that purpose. [*Anonymous*] - - - - - 271
30. Depositions suppressed after publication, because the clerk of the defendant's solicitor acted as clerk to the commissioners. [*Cooke v. Wilson*] - - - - - 380
31. If a creditor files a bill on behalf of himself and other creditors, and a decree is obtained, and the plaintiff dies, another creditor may obtain an order to file a supplemental bill, if the representatives of the deceased plaintiff do not revive within a limited time. [*Dixon v. Wyatt*] - - - - - 392
32. Affidavit of the personal service of a petition, must be filed before it can be read. [*Ex parte North*] 395
33. An order was made for the payment of money, and the defendant had been called upon seven times but could not be found, so as to be personally served with the order. On motion, supported by affidavit, an order was made for payment of the money within four days, and that service on the defendant's clerk in court should be deemed good service. [*Anonymous*] - - - - - 462
34. Where a plea is taken by commission it does not require the signature of counsel. [*Simes v. Smith*] - - - - - 366

PRINCIPAL AND AGENT.

See tit. ACCOUNT.

PRODUCTION OF DEEDS.

A defendant admitted, by her answer she had a deed in her power; but as she did not admit she then had the deed, a motion to produce the same was refused. [*Heeman v. Midland*] - - - - - 291

RECEIPTS.

See tit. VENDOR AND VENDEE.

REFERENCE.

See tit. CHARITY.

The defendant agreed to take a lease from the plaintiff, and was let into possession. The plaintiff filed a bill for a specific performance of the agreement, and brought an action for use and occupation. It

was referred to the Master, to see if the defendant was proceeding at law and in equity for the same matter. He reported in the affirmative; and an exception to his report was overruled. [*Carrick v. Young*] - - - - - 437

REPLICATION.

See tit. PRACTICE, 4. 19.

REPORT.

See tit. EXCEPTIONS, 1.—PRACTICE, 14.

RESTS.

See tit. MORTGAGOR AND MORTGAGEE, 5.

RESULTING TRUST.

See tit. DEVISES AND BEQUESTS, 13.

REVOCATION OF WILL.

If the owner of an unqualified equitable fee devises it, and afterwards the unqualified legal fee is conveyed to him, the will is not thereby revoked, because such conveyance was incident to the equitable fee devised; but if, after the will, he takes a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, it being a change in the quality of the estate, and not incident to the equitable fee. [*Ward and another v. Moore and another*] 368

SATISFACTION OF COVENANT.

Covenant by husband, on marriage, to pay to the wife 1,000*l.* six months after his decease. By his will he gives her 1,000*l.* payable three months after his decease; and after certain specific legacies, directs the residue of his real and personal estate to be sold, and thereout paid all his debts and legacies; and to pay the interest on the residue to his wife for life, or until her second marriage, with a bequest over on her death or marriage. The legacy held to be a satisfaction of the covenant. [*Wathen v. Smith*] - - - - - 325

SATISFACTION OF LEGACY.

See tit. LEGACY, 6.

SCANDAL.

A stranger to the record cannot move to refer a bill for scandal. [*Anonymous*] - - - - - 252

SCHEDULES TO ANSWER.

See tit. ANSWER.

SECURITY FOR COSTS.

See tit. COSTS, 3.

SEPARATE ESTATE.

See tit. LEGACY, 5.

SEQUESTRATION.

Motion for payment of a sum due in

respect of a composition for tithes, out of a fund in court, the produce of growing crops on a farm, paid in by sequestrators, refused, with costs. [*Dickenson and others v. Smith*] - - - - - 177

SUBPŒNA TO HEAR JUDGMENT.

See tit. PRACTICE, 9.

SUBSTITUTED LEGACY.

See tit. LEGACIES, 3

SUPERSEDEAS OF COMMISSION.

See tit. BANKRUPTCY, 5.

SUPPLEMENTAL BILL.

See tit. PRACTICE, 10.

SUPPLEMENTAL SCHEDULE.

See tit. ANSWER.

SUPPRESSION OF DEPOSITIONS.

See tit. PRACTICE, 30.

SURRENDER.

See tit. BANKRUPTCY, 8.

SURVIVORSHIP.

Words of survivorship are to be referred to the period of division and enjoyment, unless there be a special intent to the contrary. [*Cripps v. Wolcott and others*] - - 11

TITHES.

See tit. COMPOSITION REAL.—DEMURRER, 2.—NEW TRIAL—SEQUESTRATION.

TOLL.

This court has jurisdiction to decree an account of toll due by custom, in respect of a mill, although the custom was established in a former suit. It appearing, however, in this case, that ancient mills were destroyed, and another mill of a different kind erected, and that other legal objections were taken; the court retained the bill, with liberty to the plaintiffs to bring such action or actions at law as they should be advised. [*Duke of Norfolk v. Myers and others*] - - - 83

TRADERS.

The act of the 47 Geo. III. sess. 2, ch. 74, applies only to persons who were traders at the time of their decease, and not to persons who have left off trade before they died. [*Hitchon and another v. Bennett and others*] - - - - - 180

TRAVERSE.

The right of the subject, to traverse an inquisition, extends to every case in which property is found in the crown; and is not confined to cases where the crown claims property by reason of the incidents of tenure. But when the application

for permission to traverse is made to this court, it will not be authorized, unless the petitioner makes out a *prima facie* title against the crown. [*Ex parte Lord Gwydir and another*] - - - - - 281

TRUSTEES.

1. On demurrer, held, that a power given to trustees to sell lands, and divide the profits amongst *cestuis que* trust, who were infants, enables the trustees alone to give effectual receipts to a purchaser. [*Sowarsby v. Lacy and others*] - 142
2. On a Bill, filed for the substitution of new trustees, a decree was made accordingly, and for a conveyance to them; the court refused to admit a clause in the conveyance, to enable the new trustees to appoint (if necessary) others in their stead, there being no provision in the trust deed for that purpose. [*Bayley v. Mansell*] - - - - - 226

VENDOR AND VENDEE.

See tit. AUCTIONEER, 5.—DEVISES AND BEQUESTS.—COSTS, 2.—JUDGMENT CREDITOR.

1. Certain timber trees were ordered to be sold before the Master, the purchase-money to be secured by recognizances, and payable by certain instalments at given periods. The purchasers being desirous of paying the purchase-money immediately, on being allowed a dis-

count, an order was made for that purpose, the defendants consenting. [*Sitwell v. Sitwell*] - 183

2. On an exception to the Master's report, that a good title could not be made, the question was, Whether on a sale of one of two houses, with an apportioned rent of 40*l.* but no apportionment had taken place, the purchaser would, by the conveyance of the vendor without the concurrence of the lessee, acquire the same rights and remedies against the lessee, in respect of the apportioned rent of 40*l.* therein to be reserved to him, as he would acquire, in case no rent were mentioned in such conveyance from the vendor; and the annual rent of 40*l.* were legally apportioned by a jury for that part of the reversion comprised in lot 2. Upon this question a case was sent to law. [*Bliss v. Collins*] 229
3. Assignees putting up to sale, as the particulars of sale stated, "the bankrupt's interest to an estate, as he lately held the same; an abstract of which may be seen at the office of Messrs. T. & Co." Held, that vendee could not insist upon any other title than such as the bankrupt had. [*Freme and others v. Wright*] - - - - 364
4. If a purchaser makes frivolous objections to a title, he pays the costs; but not if he makes a fair objection, or insists on inquiry as to a material fact, respecting which

- there is a fair doubt. [*Thorpe v. Freer*] - - - - - 465
5. Assignee, desirous of becoming a purchaser of the estate of the bankrupt, must first obtain the consent of the creditors, and then petition, and serve the other assignees with the petition, and also the bankrupt. [*Ex parte Bage and others, in re Wickstead*] 459
6. If a purchaser is, under the purchase agreement, let into possession, and has exercised acts of ownership, but objects to the title, he must deliver up possession, or pay in his purchase-money. [*Wickham v. Evered*] - - - - 53
7. On demurrer, held, that a power given to trustees to sell lands and divide the profits amongst the *cestuis que* trust, who were infants, enables the trustees alone to give effectual receipts to a purchaser. [*Sowarsby v. Lacy*] - - - 142
8. A person purchased under a decree two-sevenths of an estate in one lot, and no title could be made to one one-seventh; the purchaser held to be at liberty to be discharged from the whole of his purchase. [*Roffey v. Shallcross*] 227
9. Where a copyhold is sold under a commission of bankruptcy, a good title is made by a bargain and sale from the commissioners to the purchaser. [*Ex parte Holland, in re Harvey*] - - - 483

USURY.

Mortgagor agrees to give a second mortgage for what is due for principal, and also compound interest, on the first mortgage. *Query*, if the second mortgage is void, as being usurious. [*Sackett v. Bassett and others*] - - - - - 58

WILL.

See tit. DEVISES.—LEGACIES.—PRACTICE, 18. 21.—REVOCATION.—SATISFACTION OF COVENANT.

WITNESS.

See tit. DEMURRER, 1, 3.

END OF THE FOURTH VOLUME.

ERRATA.

Page 43, line 4, for "just" *read* "full."

In line 5 of the marginal note in page 67, put a full stop at the end of the word "passed."

In line 5 from the bottom of page 268, for "Defendant" *read* "Plaintiff."



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